(20)

No. 96-1337-CFX
Status: GRANTED

Docketed:
February 21, 1997

Title: County of Sacramento, et al., Petitioners
v.
Teri Lewis and Thomas Lewis, Personal Representatives of the Estate of Philip Lewis, Deceased

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Cassidy,Terence J.

Counsel for respondent: Baum,Michael L.

40 copies ea ptn & sep appdx. Ptn due & mld 2-19-97, see ml label re dkt dt. NOTE: 10 copies of USAP6 opinion lodged, on shelf with petitions.

Entry	Date	Note	Proceedings and Orders
1	Feb 19 1997	G	Petition for writ of certiorari filed. (Response due April 22, 1997)
2	Feb 19 1997		Appendix of petitioner filed.
4	Mar 20 1997		Order extending time to file response to petition until April 22, 1997.
5	Mar 20 1997		Brief amici curiae of Counties of Riverside and San Diego and City of Los Angeles filed.
6	Mar 21 1997		Brief amici curiae of California, et al. filed.
7	Apr 22 1997		Brief of respondents Teri Lewis and Thomas Lewis in opposition filed.
8	May 6 1997		DISTRIBUTED. May 22, 1997 (Page 1)
9	May 9 1997	X	Reply brief of petitioners County of Sacramento, et al. filed.
11	May 27 1997		REDISTRIBUTED. May 29, 1997 (Page 12)
12	Jun 2 1997		Petition GRANTED. SET FOR ARGUMENT December 9, 1997. **********
14	Jul 3 1997		Order extending time to file brief of petitioner on the merits until August 8, 1997.
15	Jul 14 1997		Joint appendix filed.
18	Aug 6 1997		Brief amici curiae of County of Riverside, et al. filed.
16	Aug 8 1997		Brief of petitioners County of Sacramento, California, et al. filed.
17	Aug 8 1997		Brief amici curiae of National Association of Counties, et al. filed.
19	Aug 8 1997		Brief amicus curiae of City and County of Denver, Colorado filed.
20	Aug 8 1997		Brief amici curiae of Alaska, et al. filed.
21	Aug 8 1997	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
23	Aug 25 1997		Order extending time to file brief of respondent on the merits until October 3, 1997.
24	Sep 29 1997		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
31	Oct 1 1997		Brief amicus curiae of Solutions to the Tragedies of Police Pursuits filed.

2 pp

No. 96-1337-CFX

Entry	Date	Note	Proceedings and Orders
25	Oct 3 1997		Brief amicus curiae of Association of Trial Lawyers of America filed.
26	Oct 3 1997	G	Motion of Grand Lodge of the Fraternal Order of Police for leave to file a brief as amicus curiae filed.
27	Oct 3 1997		Brief of respondents Teri Lewis and Thomas Lewis filed.
28	Oct 3 1997		Brief amici curiae of Gabriel Torres, et al. filed.
29	Oct 3 1997		LODGING consisting of forty bound copies of oversized appendix material submitted by counsel for amici Torres, et al.
32	Oct 14 1997		Motion of Grand Lodge of the Fraternal Order of Police for leave to file a brief as amicus curiae GRANTED.
33	Oct 24 1997		CIRCULATED.
34	Nov 5 1997	X	Reply brief of petitioners County of Sacramento, et al. filed.
36	Nov 12 1997	D	Motion of Gabriel Torres, et al. for leave to participate in oral argument as amici curiae and for divided arguement filed.
37	Nov 24 1997		Record filed.
		*	Record proceedings U.S. Court of Appeals for the Ninth Circuit (1 volume).
38	Dec 1 1997		Motion of Gabriel Torres, et al. for leave to participate in oral argument as amici curiae and for divided arguement DENIED.
39	Dec 1 1997		Record filed.
		*	Record proceedings U.S. District Court, for the Eastern District of California (1 box).
40	Dec 9 1997		ARGUED.

(1)

Supreme Court, U.S.
FILED

NO. 961337 FEB 19 1997

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS

Respondents,

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit,

---

PETITION FOR A WRIT OF CERTIORARI

Terence J. Cassidy*
Marcos A. Kropf
Porter, Scott, Weiberg & Delehant
350 University Avenue, Suite 200
Sacramento, CA 95825
Telephone: (916)929-1481
Attorney for Petitioners
*Counsel of Record

37 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment is "shocks the conscience" as determined by this Court in Collins v. City of Harker Heights, Texas, 503 U.S. 115, 112 S.Ct. 1061 (1992) and other Circuit Court cases or is "deliberate indifference" or "reckless disregard" as determined by the Ninth Circuit in this case.

II. Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment was clearly established for the purpose of granting qualified immunity to a peace officer when there is a conflict in that legal standard between the decision by this Court in Collins and by other Circuit Courts of Appeal requiring conduct that "shocks the conscience" and the holding by the Ninth Circuit in this case that the conduct be "deliberately indifferent."

III. Whether a peace officer involved in a police pursuit is entitled to qualified immunity when a reasonable officer could not have known he may be violating the law due to conflicting legal standards of conduct and where the factual contours of the legal standard are not sufficiently defined.

LIST OF PARTIES

The caption in this case contains the names of all the parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

Opinions Below 1

Jurisdiction 1

CONSTITUTIONAL PROVISION IN ISSUE 2

Fourteenth Amendment To The United States Constitution, Section I 2

STATEMENT OF THE CASE 2

A. Facts Giving Rise to this Case 2
B. The Initial Proceedings 4
C. The Appeal 6

REASONS WHY CERTIORARI SHOULD BE GRANTED 7

Review Is Warranted Because The Opinion By The Ninth Circuit Conflicts With The Opinions Of This Court And Those Of The First, Third And Fourth Circuits Concerning The Standard Of Care Necessary To Prove A Violation Of Substantive Due Process Under The Fourteenth Amendment And It Is of National Importance To Allow For Uniformity In The Application Of That Standard To Peace Officers In Police Pursuits 7

Review Is Warranted Because Of The National Importance In Affording Qualified Immunity To Peace Officers When The Law Is Not Clearly Established Due To Conflicting Legal Standards 13

Review Is Warranted To Allow Qualified Immunity For Peace Officers Where A Reasonable Officer Involved In A Police Pursuit Would Not Have Known That He Was Violating Clearly Established Law 23

CONCLUSION 28

TABLE OF AUTHORITIES

Adams v. St. Lucie County Sheriff's Dept.,
962 F.2d 1563, 1577 (11th Cir 1992),
(Edmondson, dissenting), vacated,
reh'g en banc granted, 982 F. 2d 472 (1993)
rev'd per curiam, 998 F.2d 923 (1993) 25

Anderson v. Creighton,
483 U.S. at 638 (1987) 14

Barts v. Joyner,
865 F.2d 1187, 1193 reh'g denied,
871 F.2d 122 (11th Cir. 1989) 24

Brower v. County of Inyo,
489 U.S. 593, 109 S.Ct. 11378 (1989) 16, 25

Canton v. Taylor,
782 F.2d 947, 950 (11th Cir. 1986) .. 16, 17, 20, 24

Checki v. Webb,
785 F.2d 534, 538 (5th Cir. 1986) ... 16, 19, 20, 25

City of Canton v. Harris,
489 U.S. 378, 109 S.Ct. 1197 (1989) 9

Collins v. City of Harker Heights, Texas,
503 U.S. 115, 112 S.Ct. 1061 (1992) . i, 8-13, 15, 23

Donovan v. City of Milwaukee,
17 F.3d 944, 953 (7th Cir. 1994) 25

Evans v. Avery,
100 F.3d 1033, 1038-39 (1st Cir. 1996) . 10, 12, 15

Fagan v. City of Vineland,
22 F.3d 1296,
1306-07 (3rd Cir. 1994) (en banc) 10, 13, 15

Frye v. Town of Akron,
759 F.Supp. 1320, 1325 (N.D. Ind. 1991) 17

Galas v. McKee,
801 F.2d 200, 205 (6th Cir. 1986) 18, 20, 21

Graham v. Conner,
490 U.S. 386, 109 S.Ct. 1865 (1989) 26

Harlow v. Fitzgerald,
457 U.S. 800, 818 102 S.Ct. 2727 (1982) 14

Hunter v. Bryant,
503 U.S. 224, 227, 112 S.Ct. 534 (1991) 24

Jones v. Sherrill, 827 F.2d 1102,
1106 (6th Cir. 1987) 16, 17, 20-22, 24

Landol-River v. Cruz Cosme,
906 F.2d 791, 797 (1st Cir. 1990) 27

Lewis v. Sacramento County,
No. 93-15924, slip op. at 13524,
13537 (9th Cir. 1996) 14, 15, 26

Malley v. Briggs,
475 U.S. 335, 106 S.Ct. 1092, 1096 (1986) 25

Medina v. City and County of Denver,
960 F.2d 1493 (10th Cir. 1992) 11

Nishiyama v. Dickson County,
814 F.2d 277, 282 (6th Cir. 1987) (en banc) .. 19, 20

Onossian v. Block,
No. 95-55837, 1996 U.S. App.
LEXIS 32781 (9th Cir. Nov. 5, 1996) 12, 26

Roach v. Fredericktown,
882 F.2d 294 (8th Cir. 1989) 16, 17, 20, 24

Rochin v. California,
342 U.S. 165, 172 72 S.Ct. 205 (1952) 8, 20

Spears v. City of Louisville,
27 F.3d 567 (6th Cir. 1994) 21

Temkin v. Frederick County Comm'rs,
945 F.2d 716, 723 (4th Cir. 1991), cert denied,
502 U.S. 1095 (1992) 10, 13, 15, 18, 22, 24, 26

Tennessee v. Garner,
471 U.S. 1 105 S.Ct. 1694 (1985) 16, 17, 25

Torres v. Bonnilla,
No. 95-55875, 1996 U.S. App.
LEXIS 32765 (9th Cir. Nov. 5, 1996) 13, 26

Uhlrig v. Harder,
64 F.3d 567, 571-74 (10th Cir. 1995) 11

Wood v. Ostrander,
851 F.2d 1212 (9th Cir. 1988),
reh'g granted op. modified 879 F.2d 583
(9th Cir. 1989) cert. denied,
498 U.S. 938 (1990) 9

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1441(a),(b), and (c). 1

42 U.S.C. § 1983 ..... 4, 5

California Government Code § 845.8(b) 5

California Vehicle Code § 17004 5

California Vehicle Code § 17004.7 5

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit is reported at 98 F.3d 434, and is reprinted in the Appendix hereto, pp. 1-41.

The memorandum order of the United States District Court for the Eastern District of California granting summary judgment in this case has not been reported. It is reprinted in the Appendix hereto, pp. 42-55.

Jurisdiction

On March 11, 1991, Respondents brought suit against petitioners in the Superior Court of the State of California in and for the County of Sacramento. On April 24, 1991, the suit was removed to the United States District Court for the Eastern District of California pursuant to 28 U.S.C. § 1441(a),(b), and (c).

On April 12, 1993, the District Court partially granted petitioner's motion for summary judgment. See App., p.55. On May 10, 1993, respondents appealed the District Court's Order to the United States Court of Appeals for the Ninth Circuit.

On October 9, 1996, the Ninth Circuit issued their opinion and judgment affirming in part and reversing in part the District Court's Order. See App. pp. 40-41. Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc to the Ninth Circuit. The petition and suggestion for rehearing en banc was denied by the Ninth Circuit on November 21, 1996. See App. p. 56.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION IN ISSUE

Fourteenth Amendment To The United States Constitution, Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Facts Giving Rise to this Case

On the evening of May 22, 1990, Sacramento County Sheriff's Deputies JAMES EVERETT SMITH and Murray Stapp responded to a call for service. Upon completing the call and returning to their marked patrol units, Officer Stapp heard a motorcycle racing its engine as it approached the officers at a high rate of speed. The motorcycle was driven by Brian Willard, with passenger Philip Lewis. As the motorcycle approached, Officer Stapp attempted to stop the driver and passenger. He activated his overhead lights, yelled at the driver to pull over, and placed his patrol unit closer to Officer SMITH's unit to block the path of the on-coming motorcycle. Officer SMITH

observed the motorcyclist maneuver between the officers two patrol cars, fail to yield to the red light, and accelerate away at a high rate of speed in violation of the law. It is undisputed that Officer SMITH then had the legal right to attempt to stop the motorcyclist.

Because of Willard and Lewis's attempt to evade the officers, Officer SMITH activated the emergency lights and siren of his patrol unit, and pursued the fleeing suspects. The pursuit lasted only seventy-five seconds and covered 1.3 miles. Officer SMITH attempted to make radio contact with Dispatch in accordance with Departmental policy, but was tuned to the wrong frequency. He was careful to slow down at intersections, made all turns without losing control of his vehicle, and maintained a distance from the motorcycle of 100 to 200 feet.

Officer SMITH determined that Willard and Lewis were endangering the public by potentially causing accidents involving other vehicles and bystanders. The route followed a series of three ninety degree left turns onto rural two lane streets. On running the first stop sign and making the first left turn to proceed northbound on Main Avenue, the motorcycle was using both the northbound and southbound lanes forcing at least two southbound vehicles to swerve off the roadway onto the shoulder. The fleeing motorcycle also crossed over the southbound lane into the southbound bicycle lane where it narrowly missed (by 1-1 1/2 feet) hitting a bicyclist, who was

forced to jump off his bicycle to avoid collision.

The motorcyclists made two more left turns and proceeded down a long straightaway on Chestnut Avenue. They crested a small rise in the road, and to make good their escape, attempted to negotiate a 90 degree left turn onto an intersecting road. The rear tire of the motorcycle locked up and the motorcycle abruptly skidded sideways to a stop in the middle of the road. Immediately upon observing the motorcycle start to slow down, Officer SMITH slammed on his brakes, and in an attempt to stop the patrol unit, skidded approximately 166 feet. Unable to stop, the patrol unit collided with the motorcycle and/or the passenger, resulting in the death of Lewis.

B. The Initial Proceedings

On March 11, 1991, respondents brought suit against petitioners in the Superior Court of the State of California in and for the County of Sacramento. On April 24, 1991, the suit was removed to the United States District Court for the Eastern District of California.

The suit was brought under 42 U.S.C. § 1983 and California State law. The first cause of action alleged that Officer SMITH's conduct deprived decedent of his right to substantive due process under Fourteenth Amendment of the U.S. Constitution. The second cause of action asserted a Monell-type claim against the COUNTY OF SACRAMENTO.

The Third Cause of Action asserted a claim for negligence under state law.

On November 11, 1992, petitioners moved for total or partial summary judgment. On April 12, 1993, the District Court appropriately granted petitioner's motion. See App., p. 55. The court found that for the purposes of granting qualified immunity, the law regarding substantive due process under the Fourteenth Amendment in the context of a police pursuit was not clearly established. See App., pp. 49, 52. Additionally, the court found that the COUNTY OF SACRAMENTO adequately trained Officer SMITH and did not have a policy amounting to deliberate indifference necessary for the entity's liability pursuant to 42 U.S.C. § 1983. See App., pp. 51-52. The District Court also dismissed the negligence claim against Officer SMITH based on the immunity in California Vehicle Code § 17004; but declined to rule upon whether the negligence claim against the COUNTY OF SACRAMENTO is barred by California Vehicle Code § 17004.7, or California Government Code § 845.8(b), and dismissed that claim without prejudice to being refiled in state court.

C. The Appeal

On May 10, 1993, plaintiffs filed a notice of appeal from the District Court's Order granting defendant's motion for summary judgment.

On October 9, 1996, the Ninth Circuit issued an opinion and judgment affirming in part and reversing in part the District Court's Order. Contrary to the District Court's findings, the Ninth Circuit found that the law concerning substantive due process in the context of a police pursuit was clearly established. See App., p. 33. Additionally, the Court found that the minimum standard of conduct necessary for a violation of an individual's substantive due process rights under the Fourteenth Amendment in the context of a police pursuit was either deliberate indifference to, or reckless disregard for, the person's rights. See App., p. 20. The Court also stated that a reasonable officer in Officer SMITH's position could not have believed that his pursuit of the fleeing suspects was lawful and therefore, he would not be immune from liability. See App., p. 33.

Petitioners then timely filed a petition for rehearing and suggestion for rehearing en banc, which was denied by the Ninth Circuit on November 21, 1996. See App., p. 56.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I

Review Is Warranted Because The Opinion By The Ninth Circuit Conflicts With The Opinions Of This Court And Those Of The First, Third And Fourth Circuits Concerning The Standard Of Care Necessary To Prove A Violation Of Substantive Due Process Under The Fourteenth Amendment And It Is Of National Importance To Allow For Uniformity In The Application Of That Standard To Peace Officers In Police Pursuits

On October 9, 1996, the Ninth Circuit issued an opinion holding that the minimum standard of conduct necessary to prove a violation of an individual's substantive due process rights under the Fourteenth Amendment in the context of a police pursuit is either deliberate indifference to, or reckless disregard for, the person's rights. See App., p. 20. In reaching its decision, the Ninth Circuit relied upon the standard adopted by this Court for municipal liability and disregarded this Court's most recent analysis of the legal standard to determine whether there was an underlying constitutional violation. Review of that opinion is therefore necessary and appropriate since that opinion is directly to the decisions by this Court and other circuit courts and to provide for a rule of national application and uniformity to be relied upon by peace officers involved in police pursuits

throughout the United States.

In Collins v. City of Harker Heights, Texas, 503 U.S. 115, 112 S.Ct. 1061 (1992), this Court concluded that the legal standard for determining whether there has been a constitutional violation of the right of substantive due process under the Fourteenth Amendment is conduct that is "conscience shocking." 503 U.S. at 128. In examining whether the allegations in that case could be properly "characterized as arbitrary or conscience shocking in a constitutional sense," Id. at 128, this Court relied upon the guidelines established in Rochin v. California, 342 U.S. 165, 172 72 S.Ct. 205 (1952). Although the facts in Collins involved alleged unsafe working conditions causing the death of a worker who entered a sewer without adequate ventilation, the analysis of substantive due process is instructive because the type of theory asserted was a creation of danger by a state actor. This Court specifically distinguished other cases in which it has analyzed claims for alleged violations of substantive due process as dealing with municipality liability, or liability from the duty of care owed to persons already deprived of their liberty. Collins, 503 U.S. at 123 and 127. Petitioners respectfully submit that since individuals fleeing from peace officers have not yet been deprived of liberty, police pursuit cases that do not involve forcible stops are more properly characterized under the category of cases advancing a theory of creating the danger.

Having failed to analyze that distinction, the Ninth Circuit's opinion incorrectly concluded that the standard for alleged violations of substantive due process should be adjudged by the broader "deliberate indifference" standard applicable to municipalities and the duties owed to persons post deprivation of their liberty, rather than the narrower standard of "shocks the conscience" applicable to theories involving the alleged creation of danger by state actors. Thus, contrary to the interpretation offered by the Ninth Circuit in this case, this Court has determined that the legal standard for a violation of the substantive component of the due process clause of the Fourteenth Amendment under the type of theory asserted in this case to be conduct that "shocks the conscience."

In determining the legal standard to be deliberate indifference, the Ninth Circuit relied upon City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197 (1989) and Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988), reh'g granted op. modified 879 F.2d 583 (9th Cir. 1989) cert. denied, 498 U.S. 938 (1990). The City of Canton case, however, established the legal standard for a violation of substantive due process against a municipality. This Court emphasized in Collins, however, that the decision in Canton was limited to whether the "constitutional deprivation was attributable to a municipal policy or custom" and was "not deciding the constitutional issue." Collins, 503 U.S. at 123 The decision in Collins then went on to adopt the

"shocks the conscience" standard to ascertain whether there was a constitutional violation. Id. at 126.

The First, Third, and Fourth, Circuit Courts of Appeal have also correctly identified the legal standard for peace officers engaged in police pursuits who are alleged to have violated a person's right to substantive due process under the Fourteenth Amendment as conduct that "shocks the conscience." See Evans v. Avery, 100 F.3d 1033, 1038-39 (1st Cir. 1996); Fagan v. City of Vineland, 22 F.3d 1296, 1306-07 (3rd Cir. 1994) (en banc); and Temkin v. Frederick County Comm'rs, 945 F.2d 716, 723 (4th Cir. 1991), cert denied, 502 U.S. 1095 (1992). Thus, three Circuit Courts have made decisions that are directly contrary to the holding by the Ninth Circuit in this case.

The First Circuit, in adhering to the principles set forth in Collins, held that "a police officer's deliberate indifference to a victim's rights, standing alone is not... sufficient for a substantive due process claim in a police pursuit case." Evans, 100 F.3d at 1038. "Rather, in such a case, the plaintiff must also show that the officer's conduct shocks the conscience." Id. Evans specifically criticized the Ninth Circuit opinion in this case stating:

> "We refuse to follow Lewis because we believe the panel paid insufficient attention both to Collins and to the legitimate demands of law enforcement when it asserted without engaging

> in any analysis that 'deliberate' indifference is always sufficient' to maintain a section 1983 substantive due process action." Id. at 1038 n.4.

The Tenth Circuit also recently adopted the test enunciated in Collins in a case involving alleged violations of substantive due process. Uhlrig v. Harder, 64 F.3d 567, 571-74 (10th Cir. 1995). The Uhlrig case is also instructive because the Tenth Circuit correctly determined that in order to establish the "shock the conscience" standard, a plaintiff must prove more than a government act that intentionally or recklessly caused injury. Id. at 574. Specifically, a plaintiff must show that the conduct is so outrageous that it truly shocks the conscience. Id. Moreover, in reaching its conclusion in this case, the Ninth Circuit also relied upon the holding in Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992) that a plaintiff need only show reckless disregard to support a claim for violation of substantive due process in a police pursuit case. App. at p. 12. In Uhlrig, a case decided more than one year prior to the issuance of, but not cited in, the opinion in this case, the Tenth Circuit makes it abundantly clear that the standard must involve more than reckless disregard, and requires conduct that "shocks the conscience."

The decision by the Ninth Circuit in this case goes beyond raising an actual conflict in the legal standard to be applied with respect to alleged violations of substantive due

process. It did what this Court and the other circuits have been reluctant to do: It expanded the concept of substantive due process. See Collins, 503 U.S. at 124. In Collins, this Court stated that it has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-ended. Id. If the Ninth Circuit opinion is allowed to stand, then it will have created a new minimum requirement to sustain a violation of substantive due process, which is not only contrary to this Court's clearly articulated legal standard in Collins, but derogates from the policy against expansive interpretation of the substantive due process clause.

Every day law enforcement officers are put in the unfortunate position of having to pursue fleeing suspects. These pursuits are not instigated by the police, but rather by the suspects themselves who choose not to yield to lawful authority. Police pursuits are not only a necessary concomitant of maintaining order in our modern society, but they are inherently hazardous. Evans, 100 F.3d at 1038. The practical effect of the Ninth Circuit decision is to essentially encourage artful pleading, eliminate qualified immunity, and/or create a triable issue of fact whenever an officer is involved in a pursuit and a suspect is injured. This is already evident from two recent pursuit cases *citing* Lewis and reversing lower court decisions. See Onossian v. Block, No. 95-55837, 1996 U.S. App. LEXIS 32781 (9th

Cir. Nov. 5, 1996) (given allegations that officers pursued motorists at speeds up to 100 mph on busy surface streets, it cannot be said that plaintiff could prove no set of fact entitling them to recover); and Torres v. Bonnilla, No. 95-55875, 1996 U.S. App. LEXIS 32765 (9th Cir. Nov. 5, 1996) (given allegations that pursuit took place on freeway up to 130 mph with officers following within 100 yards, it cannot be said that plaintiff can prove no set of facts entitling him to relief).

The Ninth Circuit's decision in this case is contrary to the teachings in Collins and is directly contrary to the decisions in the First, Third and Fourth Circuits which properly limit the legal standard for an alleged violation of substantive due process to be conduct that "shocks the conscience." See Collins, 503 U.S. at 128; Fagan, 22 F.3d at 1303; Temkin, 94 F.2d at 720. Petitioners respectfully submit that the proper legal standard of conduct to support a claim for a violation of substantive due process in the context of a police pursuit is "shocks the conscience." As a result, the conflicting opinion by the Ninth circuit is in error and review by this Court is warranted.

II

Review Is Warranted Because Of The National Importance In Affording Qualified Immunity To Peace Officers When The Law Is Not Clearly Established Due To Conflicting Legal Standards

The District Court found that in May, 1990, the law

regarding substantive due process rights in the context of police pursuits was not clearly established. Lewis v. Sacramento County, No. 93-15924, slip op. at 13524, 13537 (9th Cir. 1996). App., pp. 49, 52. In contrast, the Ninth Circuit believed the case law involving pursuits under the Fourth and Fourteenth Amendments placed Officer SMITH on notice that he could be held liable for an alleged violation of substantive due process based upon sufficiently egregious conduct, which resulted in a finding that the law was clearly established. App., p. 33. At the time of the pursuit in this case in May, 1990, however, the case law was in a state of flux as to what conduct in the context of a police pursuit would support a claim for a violation of substantive due process, and included conduct anywhere from gross negligence to conscience shocking. Review by this Court is appropriate to insure the application of qualified immunity in cases where the law is evolving and therefore the law governing the official's conduct could not have been clearly established.

The threshold question in determining whether a claim is barred by qualified immunity is whether the conduct complained of violated law clearly established at the time of the incident. Harlow v. Fitzgerald, 457 U.S. 800, 818 102 S.Ct. 2727 (1982); Anderson v. Creighton, 483 U.S. at 638 (1987). At the time of the police pursuit in this case, and even up until the present day, there remains a conflict in the law as to the appropriate legal standard to be applied for an alleged violation

of substantive due process under the Fourteenth Amendment in those circumstances. There is a conflict between the interpretation of that legal standard by this Court in Collins and the holding by the Ninth Circuit in its opinion. Moreover, there is a direct conflict between the conclusion by the Ninth Circuit in this case and the decisions of the other circuit courts of appeal. Compare Lewis, App., p. 20, (opinion issued in October, 1996, holding that the legal standard of care for an alleged violation of substantive due process under the Fourteenth Amendment for a police pursuit occurring in May, 1990, is whether an officer acted with deliberate indifference or reckless disregard) with Evans, 100 F.3d at 1038, 1033 (opinion issued in November, 1996, involving alleged violations of substantive due process involving a police pursuit occurring in August, 1992, requires conduct that shocks the conscience); accord Fagan,, 22 F.3d at 1306-07 (opinion issued in April, 1994, involving pursuit in March, 1988), and Temkin, 945 F.2d at 723 (opinion issued in September, 1991, involving pursuit in July, 1987).

The fact that the law was not established is also manifested in the decisions from other Circuit Courts of Appeal involving police pursuits. These cases set forth conflicting legal standards to be applied in determining whether there was a violation of substantive due process under the Fourteenth Amendment, each of which was published prior to the time of

the pursuit in this case in May, 1990. See Roach v. Fredericktown, 882 F.2d 294 (8th Cir. 1989) (negligent or grossly negligent conduct does not state a claim under 42 U.S.C. § 1983 for substantive due process); Jones v. Sherrill, 827 F.2d 1102, 1106 (6th Cir. 1987) (gross negligence sufficient to support a claim for substantive due process); Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986) (abuse of official power shocking to the conscience may cross the constitutional line); Cannon v. Taylor, 782 F.2d 947, 950 (11th Cir. 1986) (negligent or even grossly negligent conduct not sufficient to support alleged substantive due process violation). In light of the differences in those applicable standards, it is difficult to conceive how a reasonable peace officer, let alone a legal scholar, would have viewed the law regarding the standard for a violation of substantive due process to be clearly established. In fact, many of the cases cited above, including the instant opinion, go to painstaking efforts to attempt to define the current state of the applicable standard as to substantive due process as it continues to vary from circuit to circuit.

In support of the finding that the law was clearly established, the Ninth Circuit relies upon Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694 (1985), and Brower v. County of Inyo, 489 U.S. 593, 109 S.Ct. 11378 (1989). In those cases, this Court analyzed police conduct, the latter case involving a pursuit, under the Fourth Amendment. The Brower case

involved the use of a forcible vehicle stop by utilizing a road block. Since this case did not involve a forcible stop of any sort, the Brower analysis would not have put an officer on notice that something less than a forcible stop of a vehicle may give rise to liability at the time of the pursuit in this case.

The Ninth Circuit also uses this Court's prior decision regarding the use of deadly force in Tennessee v. Garner for the proposition that Officer SMITH could not stop Lewis with deadly force. See App., p. 28. Officer SMITH did not attempt to stop Lewis with deadly force. Remarkably, the Ninth Circuit then implies that Officer SMITH should have been on notice that the use of his patrol car constitutes the use of deadly force in a non-forcible stop case by relying upon case law decided after the pursuit in this case. App., p. 28. *Citing* Frye v. Town of Akron, 759 F.Supp. 1320, 1325 (N.D. Ind. 1991).

Additionally, the Ninth Circuit opinion overlooks the fact that the case law was not sufficiently factually defined in the context of a particularized well-recognized right to put a potential defendant officer on notice that his conduct is unlawful. In the Roach, 882 F.2d 294, Jones, 827 F.2d 1102, and Cannon, 782 F.2d 947 cases, all of which alleged egregious conduct similar to the pursuit in this case, each of the respective Circuit Courts found that the conduct of the officers involved in those pursuits did not violate a standard of gross negligence. Those cases involved high speed pursuits in which the officers

were allegedly exceeding the speed limits, violating Departmental policy, following the suspects too closely, and not properly maintaining radio contact. The Ninth Circuit proposes that those cases define the parameters of sufficiently egregious conduct for which an officer could be held liable. See App., pp. 29-31. To the contrary, each of those cases demonstrate that allegedly egregious conduct by peace officers involved in high speed pursuits was not sufficiently harmful to meet a standard of gross negligence. Thus, those cases would signify to a reasonable officer that the type of allegedly egregious conduct displayed in those pursuits would not be sufficient to support a claim for violation of substantive due process. See also Galas v. McKee, 801 F.2d 200, 205 (6th Cir. 1986) (policy of allowing pursuit of traffic offenders who do not pull over held not to infringe on the right to life). Therefore, the analysis by the Ninth Circuit fails to recognize that an officer would be left to speculate what type of pursuit conduct may be violative of substantive due process and in that context the law was not clearly established.

The holding of the Fourth Circuit in Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991) is particularly noteworthy in analyzing whether the law was clearly established at the time of the pursuit in this case in May, 1990. The police pursuit in Temkin occurred in July, 1987. The pursuit involved a high speed chase for a significant period of time over a

distance of ten miles. The suspects' vehicle failed to negotiate a curve in the road, lost control, crossed over the yellow line, and struck a vehicle operated by an innocent civilian. Id. Upon observing, the suspect vehicle started to lose control, the officer "stood on the brakes," but skidded out of control and struck the vehicle operated by the civilian with a speed on impact of 60 mph. Id. at 718. The suspects committed a minor criminal violation, the officer allegedly violated a Departmental pursuit policy, and there was expert testimony opinion that the officer acted recklessly and wanton. Id. at 718 and 723. In adopting the "shocks the conscience" standard, the Fourth Circuit noted that other cases involved more egregious conduct. Id. at 723. On that basis, the Fourth Circuit correctly concluded that the conduct did not "shock the conscience." When compared to the facts in this case, even in the light most favorable to respondents, it is clear that the Ninth Circuit incorrectly determined that the law was sufficiently clearly established that Officer SMITH was on notice that he was violating Lewis' rights under the Fourteenth Amendment.

It is equally important to recognize that there were only two cases which provide a factual basis which may have given rise to a violation of substantive due process in the context of the use of a police vehicle, which preceded the pursuit in this case. See Nishiyama v. Dickson County, 814 F.2d 277, 282 (6th Cir. 1987) (en banc); and Checki v. Webb, 785 F.2d at 534

(5th Cir. 1986). In Nishiyama, a police officer entrusted a fully-equipped patrol car to an inmate who then killed an innocent bystander. In Checki, there was an intentional misuse of an unmarked police unit, which tailgated a citizen's vehicle within two to three feet at speeds in excess of 100 mph. Thus, other than pursuit cases analyzed under the Fourth Amendment seizure standard, the factual bases which supported a claim for an alleged violation of substantive due process were quite limited and did not involve the type of typical pursuit of a traffic offender engaged in by Officer SMITH in this case. As indicated above, all of the cases which analyze facts similar to this case resulted in a finding of no liability against the officers. See Roach, 882 F.2d 294; Jones, 827 F.2d 1102; Cannon, 782 F.2d 947; and Galas, 801 F.2d 200. Thus, it is respectfully submitted that the Ninth Circuit opinion overlooks the fact that the right alleged to be violated was not sufficiently particularized and review by this Court is warranted to define the contours of the rights of Officer SMITH in the context of the existing case law.

The Sixth Circuit has also granted qualified immunity to a peace officer in a police pursuit case on facts and law analogous to the case at bar, involving events occurring in July, 1991. The Sixth Circuit rejected plaintiff's Fourteenth Amendment claims based on its earlier decisions in Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987) and Galas v. McKee,

801 F.2d 200 (6th Cir. 1986). Spears v. City of Louisville, 27 F.3d 567 (6th Cir. 1994) (unpublished decision). While this case may not have precedential value, it is relevant as to whether the law was clearly established. In Spears, the officer attempted to stop a motorcycle for having a broken tail light and the passenger for not wearing a helmet. The motorcycle driver attempted to evade police and collided with a truck. The court rejected plaintiff's Fourteenth Amendment claims because the officers did not violate a clearly established right. Id. Spears, Jones, and Galas are also important because the Sixth Circuit concludes that there were no violations of the Fourteenth Amendment because high speed chases do not implicate the Fourteenth Amendment, even if initiated for a non-hazardous misdemeanor. In Jones, the Sixth Circuit specifically rejected the proposition that there may have been a violation of substantive due process when the pursuit allegedly involved speeds in excess of 100 mph, a course of over five miles, in traffic, in city limits, and the patrol vehicle was following too closely for safety. Thus, a fair reading of the Jones and Galas cases would necessarily cause a reasonable officer involved in a pursuit to believe that the law in effect prior to May, 1990, was not clearly established so as to place him on notice when he could be held liable under the Fourteenth Amendment.

The direct conflict in the case law, as well as the lack of clearly defined factual scenarios in police pursuit cases, should

be reconciled so as to provide for uniform application of the appropriate legal standard to which the conduct of peace officers involved in pursuits, except forcible vehicle stops, will be judged. Only then will the law regarding what conduct may constitute a violation of one's right to substantive due process under the Fourteenth Amendment be clearly established. It is of extreme national importance that that legal standard be known and fully understood by peace officers and all law enforcement agencies throughout the country so that peace officers in the field, faced with split second decisions in constantly evolving circumstances, will have a better understanding of the constitutional parameters of their conduct when engaged in a pursuit. In light of the Ninth Circuit's holding in this case, peace officers are yet again faced with conflicting decisions from which reasonable peace officers can only speculate as to when their conduct will be within constitutional boundaries. Thus far, petitioner respectfully submits that law is not now, nor was it in May, 1990, sufficiently clearly established that Officer SMITH could have believed that his conduct was unlawful.

The Ninth Circuit's holding in this case that the law is clearly established, simply does not comport with the conflicting case law involving police pursuits as demonstrated by the Fourth Circuit in Temkin v. Frederick County Comm'rs, the Sixth Circuit's interpretation in Jones v. Sherill and this Court's

defining of the legal standard for substantive due process claims in Collins. Rather, the clear conflict of the holdings in those cases with the Ninth Circuit's decision in this case demonstrate the absence of clearly established law concerning the application of the Fourteenth Amendment in the context of police pursuits at the time of the pursuit in this case in May, 1990. It is therefore respectfully requested that the Court grant this writ of certiorari in order to review the Ninth Circuit's opinion and clarify the law governing substantive due process claims in police pursuit cases in relation to the policy favoring qualified immunity for public officials.

III

Review Is Warranted To Allow Qualified Immunity For Peace Officers Where A Reasonable Officer Involved In A Police Pursuit Would Not Have Known That He Was Violating Clearly Established Law

In its opinion, the Ninth Circuit holds that Officer SMITH was put on constructive, if not actual, notice, that he could be sued for violating Lewis' Fourteenth Amendment due process rights. See App., p. 29. Additionally, the Court states that, based on Officer SMITH's decision to institute the pursuit and the manner in which he conducted it, SMITH must have known that he was placing Lewis and Willard in great danger, any reasonable officer would have known of the danger, and no

reasonable officer could have believed such conduct was completely immune from liability. See App., p. 32. However, the test is not whether there is great danger, or whether there is a potential for liability, rather the test is whether a reasonable officer would have believed the pursuit to be lawful, in light of clearly established law and the information possessed by the officer. Hunter v. Bryant, 503 U.S. 224, 227, 112 S.Ct. 534 (1991).

The Ninth Circuit decision does not address the fact that none of the cases cited as having analyzed the legal standard of the substantive component of the Due Process Clause, many using lower standards of conduct, would have put a reasonable officer on notice that his actions were unlawful. The Ninth Circuit does not examine the fact that the conduct of Officer SMITH is substantially similar to the conduct of the officers in Jones, Roach, and Cannon. Significantly, Officer SMITH's conduct is almost identical to that of the deputy in Temkin which held that type conduct in a police pursuit did not shock the conscience. Although Temkin was decided after the subject pursuit, the deputy in Temkin engaged in a high speed pursuit in a heavily populated area and he ultimately skidded his patrol unit striking a vehicle operated by an innocent civilian. Temkin, 945 F.2d at 717. Certainly the courts cannot realistically expect a reasonable police officer to know more than reasonable judges about the law. Barts v. Joyner, 865 F.2d 1187, 1193 reh'g

denied, 871 F.2d 122 (11th Cir. 1989).

The cases decided by this Court and relied upon by the Ninth Circuit opinion deal with officers' intentional acts in attempting to stop a fleeing suspect. See Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694 (1985). Brower, 489 U.S. 593 and Checki, 782 F.2d 534. As the Court correctly pointed out, plaintiff's death did not result from an intentional act and there was no Fourth Amendment violation.

Generalities are not helpful in qualified immunity decisions because "the bright line of clearly established law" is "staked out by a process of inclusion and exclusion in individual concrete cases." Donovan v. City of Milwaukee, 17 F.3d 944, 953 (7th Cir. 1994). The line between the lawful and unlawful is often vague. Adams v. St. Lucie County Sheriff's Dept., 962 F.2d 1563, 1577 (11th Cir 1992), (Edmondson, dissenting), vacated, reh'g en banc granted, 982 F. 2d 472 (1993) rev'd per curiam, 998 F.2d 923 (1993). The clearly established standard demands that a bright line be crossed. Id. That line is not to be found in abstractions, to act reasonably, to act with probable cause, and so forth, but in studying how these abstractions have been applied in concrete circumstances. Id. "The qualified immunity defense... provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 1096 (1986).

This Court has described the difficulties faced by peace

officers in the field with rapid evolving circumstances and the need to make split second decisions. Graham v. Conner, 490 U.S. 386, 109 S.Ct. 1865 (1989). Those types of experiences are only magnified in a high speed pursuit. As it now stands, reasonable peace officers in the First, Third or Fourth Circuits would be led to believe that when presented with a pursuit of short duration, even at high speeds, in densely populated areas, for minor infractions like the theft of $17.00 worth of gas as in Temkin, and even when an expert calls it reckless, their conduct is within lawful bounds. At the same time, peace officers serving communities falling within the boundaries of the Ninth Circuit have a much broader potential for liability as the impact of the holding in Lewis unfolds. In the Ninth Circuit, any factual scenario in a pursuit is arguably a reckless disregard of someone's right to substantive due process. Officers in the Ninth Circuit will thus be forced to trial as demonstrated in the recent holdings in the Onossian and Torres cases. The state of the law should not persist laden with inconsistencies and particularly as against Officer SMITH, who, in May, 1990, did nothing more than what other reasonable officers were described to have done during pursuits up to that time.

Any time a peace officer initiates a vehicle pursuit of a fleeing suspect, there is a significant potential for danger. Law enforcement, by its vary nature, involves dealing with situations in which both the officer and the suspect are in harm's way. It

does not automatically follow that an officer should not qualify for immunity as a result. Any other conclusion would both chill law enforcement officers in the performance of their duties and encourage... criminal activity in public settings so as to minimize police intervention. Landol-River v. Cruz Cosme, 906 F.2d 791, 797 (1st Cir. 1990). Officer SMITH did not intentionally or recklessly place plaintiff in harm's way, nor did he conduct himself during the course of the pursuit in any manner which could be characterized as "shocking the conscience."

Assuming that a reasonable officer was aware of the decisions prior to the pursuit in this case in May, 1990, made outside the Ninth Circuit, as supported in subsequent decisions by circuits other than the Ninth Circuit, the case law supports the lawfulness of Officer SMITH's actions and review by this Court is necessary and appropriate to establish uniformity and national application of qualified immunity in police pursuit cases.

For these reasons, review by this Court is necessary to clarify this important area of the law so that officers may know the effective bounds of their conduct and/or whether and under what circumstances they should pursue fleeing suspects.

CONCLUSION

Based on the foregoing, petitioners respectfully submit that this petition for writ of certiorari should be granted.

DATED: February 14, 1997 Respectfully submitted,

Terence J. Cassidy*
Marcos A. Kropf
PORTER, SCOTT,
WEIBERG& DELEHANT
A Professional Corporation
350 University Avenue, Suite 200
Sacramento, CA 95825
(916) 929-1481

*Counsel of Record *Attorneys for Petitioners*

(21)

Supreme Court, U.S.
FILED

961337 FEB 19 1997

NO. _____

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,
Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS
Respondents,

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit,

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Terence J. Cassidy*
Marcos A. Kropf
Porter, Scott, Weiberg & Delehant
350 University Avenue, Suite 200
Sacramento, CA 95825
Telephone: (916)929-14810

Attorney for Petitioner

*Counsel of Record

63 pp

TABLE OF CONTENTS

Page

Ninth Circuit Opinion 1

United States District Court For the Eastern District of California's Order Regarding Summary Judgment . . .46

Order Denying Rehearing 61

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERI LEWIS and THOMAS LEWIS,
Personal Representatives of the
Estate of Philip Lewis,
Plaintiffs-Appellants,
v.
SACRAMENTO COUNTY; SACRAMENTO
COUNTY SHERIFF'S DEPARTMENT;
JAMES E. SMITH,
Defendants-Appellees.

No.93-15924
D.C. No.
CV-91-00505-GEB

OPINION

Appeal from the United States District Court for the Eastern District of California Garland E. Burrell, District Judge, Presiding

Argued and Submitted
October 7, 1994--San Francisco, California

Filed October 9, 1996

Before Mary M. Schroeder,* Harry; Pregerson, and Charles Wiggins, Circuit Judges

Opinion by Judge Pregerson

Terence John Cassidy, Porter, Scott, Weiberg & Delehand, Sacramento, California, for the appellees.

---

*The Honorable Harold M. Fong, United States District Judge for the District of Hawaii participated in oral argument. Judge Fong died on April 20, 1995. Pursuant to Ninth Circuit General Order 9.2g, the Honorable Mary Schroeder was drawn to replace Judge Fong on the panel. Judge Schroeder has read the briefs, reviewed the record, and listened to the tape of oral argument held by telephone conference on October 7, 1994.

OPINION

PREGERSON, Circuit Judge:

This 42 U.S.C. § 1983 case involves a high-speed pursuit of two teenagers on a motorcycle by a law enforcement officer in a patrol car. One of the teenagers was killed. We have jurisdiction under 28 U.S.C. § 1291. We reverse the district court's grant of summary judgment on the issue of qualified immunity as to the officer but affirm the grant of summary judgment in favor of the municipal defendants.

I.

Because this case comes before us on summary judgment, the following facts are presented in the light most favorable to plaintiffs. See Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994).

On the evening of May 22, 1990, at about 8:30 p.m., James Everett Smith, a Sacramento County sheriff's deputy, along with Murray Stapp, a Sacramento police officer, responded to a call to break up a fight. After handling the call, the

officers returned to their separate patrol cars. As they were preparing to leave, Officer Smith saw Stapp's overhead lights come on and saw him yell something at two boys riding a motorcycle. Apparently, the windows of Smith's patrol car were up, so Smith could not hear what Stapp yelled at the boys. Neither boy was involved in the altercation-they just happened to ride by.

Brian Willard was driving the motorcycle, and Philip Lewis, the decedent, was a passenger. Both boys were minors; Lewis was sixteen. Neither boy wore a helmet. Stapp pulled his vehicle closer to Smith's to keep the motorcycle from leaving, but Willard drove the motorcycle slowly between the two cars and then accelerated away. Smith executed a three point turn and initiated a high-speed pursuit.

The pursuit lasted about seventy-five seconds and covered approximately 1.3 miles. Posted speed limits were as low as 30 miles per hour. The average speed of the vehicles was calculated to be 60 miles per hour, with high speeds of up to 100 miles per hour. The pursuit went through four stop lights and three ninety-degree left turns. During the pursuit, Smith's

patrol car followed the motorcycle at a distance of as little as 100-150 feet, even though Smith drove at a speed that would have required 650 feet for him to stop his car. Smith was also driving at such a speed that his stopping distance was beyond the range of his headlights.

The chase ended when the motorcycle went over a crest in the road, attempted to make a hard left turn, and skidded to a halt. It is unclear whether Lewis remained seated on the motorcycle or got off. Smith saw the stopped motorcycle as he came over the crest of the hill. He slammed on his brakes but was unable to stop his vehicle in time. Smith was driving at a minimum of 65 miles per hour when he began braking. After skidding, 147 feet, his patrol car hit Lewis at a speed of approximately 40 miles per hour, propelling Lewis nearly 70 feet down the road. Smith's car continued off the road, coming to rest in a residential front yard after knocking over a mailbox.

Lewis suffered massive internal injuries and a fractured skull. He was pronounced dead at the scene. Willard, the motorcycle driver, suffered no major injuries.

Plaintiffs Teri and Thomas Lewis, Philip Lewis's parents, filed suit in Sacramento County Superior Court against Sacramento County, the Sacramento County Sheriff's Department, and Officer Smith. The Lewises allege a deprivation of their son's Fourteenth Amendment due process rights in violation of 42 U.S.C. § 1983 and wrongful death under California state law. Defendants removed the case to federal court on the basis of federal question jurisdiction and moved for summary judgment on various grounds.

The district court granted summary judgment in favor of all defendants on the § 1983 claims. The court also granted summary judgment in favor of Smith as to the state causes of action. The court denied summary judgment as to the pendent state law causes of action against the County and the Sheriff's department, dismissing those claims without prejudice. The district court's decisions are summarized below.

First, the district court assumed, without deciding, that Officer Smith had violated Lewis's constitutional rights. The court then addressed Smith's claim to qualified

immunity. The court stated that plaintiffs had not presented, and it could not find, any "state or federal opinion published before May, 1990, when the alleged misconduct took place, that supports plaintiffs' view that they have a Fourteenth Amendment substantive due process right in the context of high speed police pursuits." The court therefore found that the law regarding Lewis's Fourteenth Amendment right to life and personal security was not clearly established and granted summary judgment in favor of Officer Smith on qualified immunity grounds.

Second, the court granted summary judgment in favor of the county and the sheriff's department on plaintiffs' claim that both entities had failed to adequately train sheriff's deputies in high-speed pursuits. The court found that, although Smith had received no training in pursuits, he had received training in high-speed driving and that the driving skills overlapped to some extent. The court thus concluded that the training procedures were "not so inherently inadequate" that the sheriff's department and the county could be held liable under § 1983 for inadequate

training.

Third, the court granted summary judgment in favor of the sheriff's department, finding that its pursuit policy was not deliberately indifferent to Lewis's constitutional rights. The court reasoned that the department's policy exceeded California statutory standards and carefully delineated the factors an officer should consider before initiating or continuing a high-speed pursuit.

Finally, with respect to plaintiffs' state law negligence claims, the court found Officer Smith immune from suit under California Vehicle Code § 17004. Because the court dismissed all federal claims, it declined to decide whether the county and the sheriff's department were also immune under California law. The court then dismissed without prejudice the state claims against the county and sheriff's department to allow plaintiffs to file those claims in state court.

Plaintiffs appeal.[1]

II.

We review de novo the district court's grant of summary judgment. We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. We do not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue of fact for trial. Jesinger, 24 F.3d at 1130.

A.

To sustain a § 1983 civil rights action, a plaintiff must show "(1) that the conduct complained of was committed by a person acting under color of state law; and (2) that [such] conduct deprived the plaintiff of a federal constitutional or statutory right."[2] Wood v. Ostrander, 879 F.2d 583,

[1]Plaintiffs do not appeal the district court's decisions regarding the state causes of action and we therefore do not address them.

587 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990). Here, it is undisputed that defendants were acting under color of state law. At issue here is whether Officer Smith, the Sacramento County Sheriff's Department, or Sacramento County engaged in conduct that deprived Lewis of a federally protected right.

The Supreme Court has held that "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Albright v. Oliver, 510 U.S. 266, 114

[2]42 U.S.C. §1983 provides, in relevant part:

> [E]very person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

S.Ct. 807, 813 (1994) (plurality opinion) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

Lewis's claim as presented to us is properly, analyzed under the Fourteenth Amendment.[3] See Pleasant v. Zamieski, 895 F.2d 272 (6th Cir. 1990) (noting that the Supreme Court's reasoning in Tennessee v. Garner, 471 U.S. 1 (1985), likely "preserve[d] Fourteenth Amendment

[3]Here, plaintiffs do not allege any Fourth or Eighth Amendment violations. It is undisputed that Smith did not intend to hit Lewis with his patrol car. There was thus no Fourth Amendment violation. See Brower v. County of Inyo, 489 U.S. 593 (1989) (holding that Fourth Amendment seizure only occurs "when there is a governmental termination of freedom of movement through means intentionally applied"); Campbell v. White, 916 F.2d 421, 423-24 (7th Cir. 1990) (holding that no Fourth Amendment seizure occurs when police vehicle strikes and kills suspect during a high-speed chase because the officer did not intend to hit the suspect), cert. denied, 499 U.S. 922 (1991); Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 793-96 (1st Cir. 1990) (holding that no Fourth Amendment seizure occurs when police officer inadvertently shoots hostage while aiming at captor because shooting of hostage not intentional under Brower). Moreover, because Lewis had not been convicted of or sentenced for any crime, there was no Eighth Amendment violation. See Pierce v. Multnomah County, 76 F.3d 1032, 1042 (9th Cir. 1996)(holding that Eighth Amendment's prohibition on cruel and unusual punishments does not apply until after conviction and sentence), petition for cert. denied, 65 U.S.L.W. 3001 (U.S. June 24, 1996)(No. 95-2062).

substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right to life through means other than a law enforcement official's arrest, investigatory stop or other seizure"), cert. denied, 498 U.S. 851 (1990).

The Fourteenth Amendment provides, in part, that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV,S 1. But not every government-caused deprivation of a right is a constitutional violation. See Cannon v. Taylor, 782 F.2d 947, 949 (11th Cir. 1986) ("Although the right to life is an interest of constitutional dimension, not every deprivation of life amounts to a constitutional violation and gives rise to a claim under section 1983."). "[The Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injures that attend living together in society. . . .'" Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992) (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986)). But when a law enforcement officer arbitrarily acts to

deprive a person of life and personal security in the course of pursuing his official duties, constitutional due process rights may be implicated. Daniels, 474 U.S. at 331 ("The touchstone of due process is protection of the individual against arbitrary action of government.").

[1] Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." Daniels, 474 U.S. at 330. See Daniels, 474 U.S. at 330. The underlying constitutional rights at issue here are substantive due process rights to life and liberty or personal security.

In Daniels, the Supreme Court held that where an official's or government entity's conduct constitutes mere negligence, no substantive due process violation occurs. Daniels, 474 U.S. at 328. Daniels expressly left open the question whether something less than intentional conduct such as recklessness or gross negligence would suffice "to trigger the protections of the Due Process Clause." Id. at 334 n.3. But in City of Canton v. Harris, 489 U.S. 378 (1989), the Court held that non

intentional government conduct can violate the Due Process Clause and thus lead to § 1983 liability. City of Canton held that a municipality may be liable for a failure to train its employees when such failure demonstrates "deliberate indifference to rights of persons with whom police come into contact." Id. at 388.

Five circuits have addressed § 1983 liability in the context of high-speed pursuits. These circuits have applied various labels to the standard of conduct that may lead to liability. See, e.g., Fagan v. City of Vineland, 22 F.3d 1296 (3rd Cir. 1994) (en banc) (overruling previous reckless indifference standard and adopting shocks the conscience standard); Medina v. City and County of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992) (reckless disregard); Temkin v. Frederick County Comm'rs, 945 F.2d 716, 723 (4th Cir. 1991) (shocks the conscience), cert. denied, 502 U.S. 1095 (1992); Roach v. City of Fredricktown, 882 F.2d 294, 297 (8th Cir. 1989) (holding gross negligence insufficient but not stating what standard should be applied); Jones v. Sherrill, 827 F.2d 1102, 1106 (6th Cir. 1987) (holding gross negligence

or outrageous conduct sufficient in some circumstances).[4]

[2] While we have not specifically addressed the standard of conduct to be applied to law enforcement officers in the context of high-speed vehicular pursuits, we have addressed the standard of conduct expected of officers in other types of substantive due process cases.[5]

---

[4]Jones, however, specifically relied on the gross negligence standard set forth in Nishiyama v. Dickson, Tenn., 814 F.2d 277, 282-83 (6th Cir. 1987) (en banc). The Sixth Circuit recently held that. Nishiyama's gross negligence standard is no longer good law. Foy v. City of Berea, 58 F.3d 227, 230 (6th Cir. 1995), and that the proper standard to be applied to substantive due process violations is deliberate indifference, id. at 232.

[5]No federal circuit court has required intentional government misconduct as a basis for a § 1983 due process violation. Likewise, no circuit has found that negligent conduct can form the basis of a § 1983 due process violation. But the labels the courts have applied to official conduct constituting a § 1983 due process violation range across a spectrum that lies between ordinary negligence and intentional misconduct. See, e.g., Souza v. Pina. 53 F.3d 423, 427 (1st Cir. 1995) (conduct that shocks the conscience); Foy, 58 F.3d at 232 (deliberate indifference), Swofford v. Mandrell, 969 F.2d 547, 549 (7th Cir. 1992) (deliberate indifference or reckless disregard); Weller v. Department of Social Services for Baltimore, 901 F.2d 387, 391 (4th Cir. 1990) (conduct that shocks the conscience); Colburn v. Upper Darby Township, 838 F.2d 663, 669 (3d Cir.

In one such due process case, we held that either "gross negligence, recklessness, or 'deliberate indifference'" was sufficient to state a substantive due process violation. Wood v. Ostrander, 851 F.2d 1212, 1214 (9th Cir. 1988) ("Wood I"), reh'g granted and opinion modified by, 879 F.2d 583 (9th Cir. 1989) ("Wood II"), cert. denied, 498 U.S. 938 (1990). Relying on the standard set out in Wood I, we later held that "grossly negligent or reckless official conduct that infringes upon an interest protected by the Due Process Clause is actionable under § 1983." Fargo v. City of San Juan Bautista, 857 F.2d 638 (9th Cir. 1988). But Fargo's grossly negligent standard was explicitly based on Wood I, which was modified on rehearing and superseded by Wood II. In Wood II, we stepped back from the grossly negligent standard. We noted that an

---

1988) (deliberate indifference or reckless indifference), cert. denied, 489 U.S. 1065 (1989); Morales v. New York State Dept. of Corrections, 842 F.2d 27, 30 (2nd Cir. 1988) (deliberate indifference); Harris v. Maynard, 843 F.2d 414, 416 (10th Cir. 1988) (wanton or obdurate disregard or deliberate indifference); Stevens v . Corbell, 832 F.2d 884, 889 (5th Cir. 1987) (conduct that shocks the conscience); Taylor v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987) (deliberate indifference), cert. denied, 489 U.S. 1065 (1989).

intervening Supreme Court decision, City of Canton, 489 U.S. 378, had called into question this standard as set forth in Wood I and Fargo. Wood II, 879 F.2d at 588.

In City of Canton the Supreme Court held that deliberate indifference was the minimum standard of culpability necessary to maintain a § 1983 due process action against a municipality for a policy or custom of inadequate training of police officers. City of Canton, 489 U.S. at 388. The Court reasoned that a municipality's inadequate training of its employees can only, constitute a "policy or custom" when such inadequate training "evidences a 'deliberate indifference' to the rights of its inhabitants." Id. at 389. But the Court also specified that the deliberate indifference standard "does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation." Id. at 388 n.8. City of Canton thus did not explicitly overrule our decisions in either Wood I or Fargo because they involved claims of substantive due process violations against

individual police officers.

Following the Court's decision in City of Canton, we granted rehearing and issued a new opinion, Wood II, that disavowed the gross negligence standard set out in our opinion in Wood I. Wood II also had the effect of modifying Fargo to the extent that Fargo relied explicitly on Wood I in setting a gross negligence standard--the modification of Wood I eliminated the legal foundation for Fargo.

In sum, it is clear from Wood II that Wood I and Fargo are no longer good law to the extent that they set a standard of gross negligence for § 1983 violations. "Bare" gross negligence is never sufficient to sustain a § 1983 claim for a substantive due process violation. See L.W. v. Grubbs, 92 F.3d 894, 897 (9th Cir. 1996). It is also clear that deliberate indifference is always sufficient. Fargo and Wood II are helpful in defining the meaning of these standards and in shedding light on the murky area that lies between the two standards.

In Fargo, a police officer accidentally shot plaintiff Fargo in the back while trying to handcuff him. Fargo sued under § 1983 for violations of his Fourteenth Amendment due process rights and the district court granted summary judgment in favor of all defendants without explaining its ruling. Fargo, 857 F.2d at 639. On appeal, defendants argued that Fargo's claims were barred by Daniels, 474 U.S. 327, because the officer's conduct, at most, constituted mere negligence. We rejected that argument, holding that "grossly negligent or reckless official conduct that infringes upon an interest protected by the Due Process Clause is actionable under § 1983." Id. at 640.

In Fargo, we defined gross negligence as "'more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences.'" Fargo, 857 F.2d at 641 (quoting W. Page Keeton et al., Prosser and Keeton on the Law Of Torts §34, at 212 (5th ed. 1984)). We also noted that an officer's state of mind is not an issue in a claim based on gross negligence, "although the contrary may be true where

the claim involves recklessness." Id. at 642. Although we declined to decide whether an innocent state of mind would negate recklessness or "whether recklessness may be presumed conclusively from conduct," we did note that recklessness and deliberate indifference are equivalent in the sense that they both generally refer to conduct involving "a conscious disregard of public safety." Id. at 642 n.7. We also said that, "where state officials have notice of the possibility of harm, 'negligence can rise to the level of deliberate indifference to or reckless disregard for' the victim." Id. (quoting Davidson v. Cannon, 474 U.S. 344, 357 (1986) (Blackmun, J., dissenting)). Because we concluded that a triable issue of fact remained as to whether the police officer's conduct might have been grossly negligent, we found it unnecessary to determine whether the officer's conduct might have risen to the more culpable standard of recklessness. Id. at 643.

In Wood I, we redefined the standard for § 1983 substantive due process violations by police officers. As explained above, we

recognized that the Supreme Court's decision in City of Canton, 489 U.S. 378, had called into question our decisions in Wood I and Fargo that gross negligence was sufficient. Wood II, 879 F.2d at 588. Analyzing the facts in Wood under City of Canton's deliberate indifference standard, we concluded that there remained a genuine issue of material fact as to whether the police officer in Wood had been deliberately indifferent to the plaintiff's interest in her personal security. Id. at 588.

In Wood, a police officer arrested the driver of the car in which plaintiff Wood was a passenger and impounded the car. The officer then drove away, leaving Wood stranded at night, alone in a high crime area. Wood accepted a ride with an unknown man. This man took Wood to a secluded area and raped her. Wood II, 879 F.2d at 586. Although we did not fix the level of culpability required for a due process violation, we did conclude that deliberate indifference or callous disregard was certainly sufficient. Id. at 588-89. We also noted that there was a triable, if not an undisputed, issue of fact as to

whether the police officer had knowledge of the danger in which he placed Wood. We observed that "the inherent danger facing a woman left alone at night in an unsafe area is a matter of common sense." Id. at 590.

Wood II makes clear that, in this circuit, an officer can be held liable for a § 1983 claim if that officer's conduct is deliberately indifferent to or in reckless disregard of a person's right to life and personal security.

[3] We recognize that courts should be hesitant to second guess government officials when they must make swift decisions regarding, public safety. But even swift decisions, if arbitrary, may violate the Fourteenth Amendment. See Daniels. 474 U.S. at 331. We believe that the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security. Deliberate indifference is the greatest degree of misconduct we have previously required a plaintiff to prove to sustain a § 1983

action against a law enforcement officer for violating rights protected by the Fourth Amendment's Due Process Clause. We do not here decide whether deliberate indifference or reckless disregard is the minimum standard for all substantive due process violations; we decide only that this standard of conduct is the minimum required to sustain a § 1983 claim in the context of a high-speed police pursuit.

[4] Here, plaintiffs have alleged that Officer Smith violated the Sacramento County Sheriff's Department General Order regarding pursuits ("General Order")[6] by

---

[6]The Sacramento County Sheriff's Department General Order regarding "Operation of Sheriffs Department Vehicles" provides, in part, that:

> 1) It is the duty of the driver of an authorized vehicle to exercise that amount of care which, under all circumstances, would not impose an unreasonable risk of harm upon others.
>
> 2) The officer must consider the following:
>
> Does the seriousness of the offense warrant a chase at speed in excess of the posted limit?
> Does the need for, and possibility of apprehension, justify a pursuit under the existing conditions?
> Does the pursuit present unreasonable hazards to life and property?
>
> 3) Unit initiating pursuit--responsibilities
>
> Upon commencing a pursuit, the initiating officer shall immediately broadcast the following:
>
> Officer's unit designation
> Location and direction of travel
> Vehicle description
> Reason for pursuit
>
> 4) The initiating officer shall voluntarily abort a pursuit when, in the officer's opinion the hazards of continuing outweigh the benefits of immediate apprehension.

instituting and then continuing the pursuit even when a reasonable officer would have known that to do so was in reckless disregard of Lewis's and Willard's safety. A violation of police procedures is relevant to determine whether a substantive due process violation has occurred. Fargo, 857 F.2d at 642. Police procedures are designed, in part, to guide officers when they engage in conduct that poses a serious risk of harm to either a suspect or to the general public. See Id.

[5] The General Order requires an officer to communicate his intention to pursue a

vehicle to the sheriff's department dispatch center. But defendants concede that Smith did not contact the dispatch center. The General Order requires an officer to consider whether the seriousness of the offense warrants a chase at speeds in excess of the posted limit. But here, the only apparent "offense" was the boys' refusal to stop when another officer told them to do so. The General Order requires an officer to consider whether the need for apprehension justifies the pursuit under existing conditions. Yet Smith apparently only "needed" to apprehend the boys because they refused to stop. The General Order requires an officer to consider whether the pursuit presents unreasonable hazards to life and property. But taking the facts here in the light most favorable to plaintiffs, there existed an unreasonable hazard to Lewis's and Willard's lives. The General Order also directs an officer to discontinue a pursuit when the hazards of continuing outweigh the benefits of immediate apprehension. But here, there was no apparent danger involved in permitting the boys to escape. There certainly was risk of harm to others in

continuing the pursuit.

[6] Moreover, there is no evidence that Officer Smith suspected Lewis or Willard of violating any law when he decided to institute the chase. The only alleged violations were traffic infractions that occurred during the pursuit itself. Smith pursued the boys simply because they did not stop when another officer told them to do so. This is not a case in which officers were pursuing dangerous felons. The record does not indicate that Lewis or Willard would have posed a risk to public safety had they gotten away. Nor is there any evidence indicating that the boys would have been driving recklessly had they not been pursued by Lewis. The simplest means of negating any danger the boys posed to the public would have been for Smith to discontinue the pursuit.

[7] Indeed, the dangers created by the chase were great. At least two cars and one bicyclist were forced off the road during the of the chase. The pursued vehicle was a motorcycle, offering no protection to its riders. Both boys were

minors. Neither was wearing a helmet. The chase was at night, in a residential area, and hit speeds of up to 100 miles per hour. Smith could not have stopped his car within the range of his headlights. Finally, even though Officer Smith was familiar with the area, he crested a hill blindly at a speed of about 65 miles per hour. At that speed, Smith's patrol car skidded 147 feet before striking Lewis, traveled another nineteen feet before leaving the roadway, knocked over a mailbox and came to rest 32 feet further in a residential front yard. The enormity of the danger to Lewis and Willard and to the general public was readily apparent.

[8] When we construe the facts in the light most favorable to plaintiffs, we conclude that there remains a genuine issue of material fact as to whether Officer Smith acted with deliberate indifference to or in reckless disregard of Lewis' due process rights to life and personal security.

B.

The next issue we address is whether the

law was, clearly established such that a reasonable officer, in the circumstances of this case, would have known that his conduct was unlawful.

The doctrine of qualified immunity shields public officials from liability unless their actions "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[7] Mitchell v. Forsyth, 472 U.S. 511, 524 (1985). The "central purpose of affording public officials qualified immunity from suit is to protect them from undue interference with their duties and from potentially disabling threats of liability." Elder v. Holloway, 5 10 U.S. 510, 114 S. Ct. 1019, 1022 (1994) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982)).

---

[7]In determining whether a due process right is clearly established, we do not look to regulations, but only to the law as enunciated by the courts. See Elder v. Holloway, 510 U.S. 510, 114 S.Ct. 1019, 1023 (1994). We therefore do not consider the sheriff's department's General Order regarding pursutis in determining whether a reasonable officer in Smith's position would have known that his conduct was unlawful.

Qualified immunity, of course, is not absolute. Allowing suits against government officials and government entities fulfills an important purpose: "deterring public officials' unlawful actions and compensating victims of such conduct." Elder at 1022-23.

[9] Whether a government official "is entitled to qualified immunity turns on a two part inquiry: '(1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?'" Mackinney v. Nielsen, 69 F.3d 1002., 1005 (9th (Cir. 1995) (quoting Act Up! Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993). "This does not mean that any official action is protected by qualified immunity 'unless the very action in question has previously been' held unlawful, 'but it does require that in the light of pre-existing law the unlawfulness must be apparent.'" Mendoza v. Block, 27 F.3d 1357 (9th Cir. 1994) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). We also note that there is danger in defining the right in question too narrowly. To do so would be

to allow defendants "to define away all potential claims." Kelley v. Borg, 60 F.3d 664, 667 (9th Cir. 1995).

Here, the district court found that, in May 1990, the law regarding substantive due process rights in the context of high-speed police chases was not clearly established and that Officer Smith was therefore entitled to qualified immunity. The court reasoned that plaintiffs had failed to provide any, state or federal court opinion published before May 1990 that would "support[ ] plaintiffs' view that they have a Fourteenth Amendment substantive due process right in the context of high-speed police pursuits." The court also stated that it had no obligation to independently research the law because plaintiffs had the burden of proving that the law was clearly established.

[10] Our review of the issue of qualified immunity must be "conducted in light of all relevant precedent, not simply those cited to or discovered by the district court." Elder, 510 U.S. 510, 114 S. Ct. 1019 at 1021. Relevant precedent is not

limited to cases regarding the "very action in question." Anderson, 483 U.S. at 640. Cases involving law enforcement officers' excessive use of force in the context of unconstitutional seizures were sufficiently analogous to put Smith on notice that, if he caused death or injury to someone through sufficiently egregious conduct, he could be liable under § 1983.

In Tennessee v. Garner, the Supreme Court held unconstitutional "the use of deadly force to prevent the escape of an apparently unarmed suspected felon." Tennessee v. Garner, 471 U.S. 1, 1 (1985). The Court concluded that such deadly force cannot be used unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Id. Gardner put Officer Smith on notice that he could not constitutionally stop Lewis with deadly force.

Although the deadly force used in Gardner was a bullet from a gun, a car can also be used as a deadly weapon. See Frye v. Town of Akron, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991) ("[L]ike using firearms,

pursuing a vehicle at speeds in excess of 90 miles per hour over winding roads at night constitutes the use of deadly force. . . ."). Moreover, the Supreme Court has also held that law enforcement officers' use of deadly force during a high-speed vehicular pursuit may lead to § 1983 liability. Brower v. County of Inyo, 489 U.S. 593, 599-600 (1989) (use of roadblock can constitute unconstitutional use of deadly force when suspect involved in high-speed pursuit crashes into that roadblock). Brower put Officer Smith on notice that force other than a gun could constitute unlawful deadly force. Brower also put Smith on notice that he could be held liable for the use of deadly force to stop a suspect in the context of a high-speed pursuit.

"An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." Mendoza, 27 F.3d at 1360. Common sense is relevant to the inquiry as to whether the contours of the right at issue were clearly established. See Wood, 879 F.2d at 590.

[11] In addition to Garner and Bower, three other federal cases put officer Smith on notice that he could be found liable for his conduct during a high-speed pursuit. These § 1983 cases, involving high-speed pursuits, were published before May 1990: Roach v. City of Fredricktown, 882 F 2d 294 (8th Cir. 1989), Jones v. Sherrill, 827 F..2d 1102 (6th Cir. 1987), and Checki v. Webb, 785 F.2d 534 (5th Cir. 1986). These cases sent a clear message that conduct that is sufficiently egregious may lead to §1983 liability.

In the first case, Roach, a police officer on patrol instituted a pursuit after running a license plate check on a car leaving the area of several recent burglaries and discovering that the car did not match the description of the car to which the plates were registered. During the course of the pursuit, the driver of the suspect car lost control and collided with a second car. The police officer "collided with the debris" from the accident. Roach, 882 F.2d at 295. Roach (the passenger in the suspect car) and the occupants of the second car sued the police officer for their injuries.

Before Roach was decided, the Eighth Circuit had held negligent or grossly negligent conduct insufficient to state a claim under § 1983. In Roach, the court held the officer not liable, concluding that his conduct did not "rise to the level of gross negligence and, therefore, most certainly [did] not rise to the level of conduct which would sustain a claim under section 1983." Id. at 297. The court therefore affirmed the district court's dismissal for failure to state a claim. Id. at 298.

In Jones, the complaint alleged that police officers instituted a high-speed pursuit after spotting a car reported in a police bulletin to have been involved in a property damage accident. The officers also observed the car "being driven in an unsafe manner." Jones, 827 F.2d at 1103. During the pursuit, the suspect car crossed the center line of the highway , striking an oncoming car and killing its driver, Jones. Jones' wife sued the officers for her husband's death. Id. at 1104. The Sixth Circuit held the officers not liable, concluding that "[t]he government conduct in pursuing [the

suspect] does not rise to the level of gross negligence and outrageous conduct necessary to sustain a section 1983 claim." Id. at 1106. The court therefore affirmed the district court's dismissal for failure to state a claim for violation of any of plaintiffs constitutional rights. Id. at 1103.

In these two cases the police officers were found not liable for the deaths or serious injuries that resulted from the pursuits because their conduct was not sufficiently egregious. These two cases clearly indicate that an officer cannot pursue people with impunity, sufficiently egregious conduct can lead to liability.

In the third case. Checki, the Fifth Circuit concluded that intentional misuse of a police vehicle could constitute a § 1983 violation. Checki, 785 F.2d at 538. The plaintiff, Checki, was a passenger in a car tailgated by an unmarked state police car. The driver of Checki's car attempted to evade the tailgating car, not knowing that it was a police car. The driver's evasive maneuvers led to a twenty-mile high-speed chase during which

Checki and the driver were unaware that the pursuers were police. Checki filed a § 1983 action. The district court dismissed the suit on procedural grounds related to venue and statute of limitations. Id. at 535-36. The Fifth Circuit reversed and also commented on the merits of the case. The court stated that, although "a police officer's negligent use of his vehicle" will not constitute a § 1983 violation, . . . [i]t is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's intentional misuse of his vehicle." Id. at 538.

Each of these three cases, Roach, Jones, and Checki, sent a clear message that a police officer can be held liable if his conduct is sufficiently egregious, i.e., conduct somewhere beyond gross negligence. These cases put Smith on constructive, if not actual notice, that he could be sued for violating Lewis's Fourteenth Amendment due process rights during a police chase. Thus, the law regarding police liability for death or injury caused by an officer during the course of a high-speed chase was clearly established. If that

officer's conduct was sufficiently egregious, he would be liable.

The next issue is whether, in the circumstances of this case, a reasonable officer in Smith's position could have believed his conduct was lawful. Both Fargo and Wood demonstrate that police conduct, if sufficiently egregious, is unlawful if that conduct violates someone's right to personal security. A reasonable officer in Smith's circumstances would have been aware that if his conduct was sufficiently egregious, resulting in either injury or death to Lewis or Willard, he could be held liable.

[12] Defendants allege that the law regarding police pursuits was not so clearly established that a reasonable officer would have known that the mere decision to pursue a fleeing suspect could potentially violate that suspect's due process rights. But defendants' allegations misconstrue the focus of the inquiry. It was not Smith's "mere decision to pursue a fleeing suspect" that we analyze. What we must look at is both Smith's decision to institute the pursuit

and the manner in which he conducted it. Smith must have known that he was placing Lewis and Willard in great physical danger. Any reasonable officer would have known of this danger. No reasonable officer could have believed such conduct was completely immune from liability.

[13] The remaining issue is whether Smith's conduct actually violated Lewis's rights--whether Smith, by instituting and conducting the high-speed pursuit in the manner in which he was sufficiently reckless of Lewis's safety that he can be held liable for Lewis's death. This is an issue that must be addressed by a finder of fact. Smith's actions, as alleged by plaintiffs, could be deemed to be in reckless disregard of Lewis's life and personal security. There exists a genuine issue of material fact. We thus reverse the district court's grant of summary judgment in favor of Lewis on qualified immunity grounds.

C.

Plaintiffs next argue that they should be allowed to state a claim against Officer

Smith based on the policy underlying § 1983 even if we find he merits qualified immunity. Plaintiffs reason that, because the district court dismissed the state law claims against Smith on the ground that Smith was immune from suit under California law,[8] S 1983 should provide a federal cause of action. Plaintiffs allege that the policy underlying § 1983 would be violated should they have no remedy. Plaintiffs cite no relevant authority to support this novel proposition.

Because we conclude that Officer Smith is not entitled to qualified immunity, we need not address this argument.

---

[8]California Vehicle Code § 17004 provides, in part, that:

> A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law . . .

Cal. Veh. Code § 17004 (West 1971). The district court concluded that this statute provided Smith with immunity under state law.

D.

1.

Plaintiffs next allege that the district court erred by granting summary judgment in favor of Officer Smith in his official capacity. Defendants correctly point out that an official capacity suit is actually a suit against the government entity--here, Sacramento County and the Sacramento County Sheriff's Department. As such, this suit is properly brought against the entity itself as a Monell claim. See Monell v. Department of Social Services of New York, 436 U.S. 658, 690 n.55 (1978) (explaining that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent" and holding that these entities may be sued directly); Kentucky v. Graham, 473 U.S. 159, 165 & 167 n. 14 (1985) (holding that "[t]here is no longer a need to bring official capacity actions against local government officials [because] under Monell, . . . local government units can be sued directly"). Therefore, plaintiffs' suit against Officer Smith in his official

capacity is subsumed in their Monell claim against the county and the sheriff's department, as discussed below.

2.

Plaintiffs also argue that the district court erred in granting summary judgment in favor of Sacramento County, and the Sacramento County Sheriff's Department. Plaintiffs claim that both entities evidenced deliberate indifference to Lewis's constitutional rights because they failed to adequately train Officer Smith in high-speed pursuits and because the sheriff's department ignored its own pursuit policy. We conclude that the district court was correct in granting summary judgment in favor of the county and the sheriffs department on this issue.

[14] A municipality may be liable for actions resulting in violations of constitutional rights only when the conduct of its official or agent is executed pursuant to a government policy or custom. Monell, 436 U.S. 658. To establish municipal liability under § 1983, a plaintiff must show that (1) he was

deprived of a constitutional right; (2) the municipality has a policy; (3) the policy amounts to deliberate indifference to plaintiff's constitutional rights; and (4) the policy is the moving force behind the constitutional violation. Oviatt v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992); see also City of Canton, 489 U.S. at 388. The Supreme Court has emphasized that the unconstitutional acts of a government agent cannot, standing alone, lead to municipal liability; there is no respondeat superior liability under § 1983. Monell, 436 U.S. at 692-95. A municipality may only be liable where its policies are the "'moving force [behind] the constitutional violation.'" City of Canton, at 389 (quoting Monell at 694).

Here, plaintiffs allege that the sheriff's department's and county's inadequate training of Smith caused the violation of Lewis's constitutional rights. Smith had no official training in high-speed pursuits. He had, however, received the sheriff's department's standard training in high-speed driving in 1976 and 1979. The district court found, as a factual

matter, that many of the driving skills overlap for high-speed driving and high-speed pursuits. Plaintiffs do not contest this factual finding but argue that Smith should have received additional training.

The district court concluded that the training procedures implemented by the county and the sheriff's department "are not so inherently inadequate as to subject the municipality to liability for a failure to train." What the district court meant was that plaintiffs had failed to raise a genuine issue of material fact as to whether the sheriff's department's procedures were deliberately indifferent. We agree.

[15] Plaintiffs presented no evidence that anyone other than Lewis had suffered a constitutional violation caused by a Sacramento County Sheriff's Department high-speed pursuit. Moreover, "[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city." City of Canton, 489 U.S. at 390. Inadequate training cases generally involve a "program-wide

inadequacy in training" rather than the training provided to a single government official. Alexander v. City and County of San Francisco, 29 F.3d 1355 (9th Cir. 1994), cert. denied, 115 S. Ct. 735 (1995). Here, as in Alexander, plaintiffs failed to produce any evidence demonstrating "that the alleged inadequacy of [ ] training was the result of a 'deliberate' or 'conscious' choice, which, under City of Canton, is necessary to establish a municipal policy." Id. Absent such evidence, plaintiffs failed to raise a material issue regarding whether the municipal defendants were deliberately indifferent. Rather, plaintiffs have raised only an issue of negligence, which is not a sufficiently culpable standard of conduct to impose municipal liability. See id. at 1367-68.

We also note that the facts, as alleged by plaintiffs, indicate that Officer Smith violated the sheriff's department's pursuit policy. This violation further undermines any finding that the county or the sheriff's department, as opposed to Smith could be found to have been deliberately indifferent to or in reckless

disregard of Lewis's safety.

Plaintiffs also argue that the municipal defendants have an unwritten policy of violating their own pursuit guidelines. But the only evidence they have presented regarding this "policy" is that Officer Smith was not disciplined by the sheriff's department for his pursuit of Lewis. This fact, standing alone, is insufficient to preclude summary judgment on the issue of whether the municipal entities had a pursuit policy which was deliberately indifferent to the constitutional rights of Lewis or any other person.

III.

Plaintiffs have raised a genuine issue of material fact regarding whether Officer Smith acted with deliberate indifference to or in reckless disregard of Lewis's right to life and personal security. Officer Smith is not entitled to qualified immunity. We reverse and remand for trial on this issue; but we affirm the district court's grant of summary judgment in favor of Sacramento County and the Sacramento

County Sheriff's Department. AFFIRMED in part; REVERSED in part; and REMANDED. Each side to bear its own costs on appeal.

the end

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS Personal Representative of the Estate of PHILIP LEWIS, Plaintiffs, v. COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERETT SMITH Defendants.	CIV-91-505 GEB-GGH ORDER

FILED
APRIL 12 1993
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF
CALIFORNIA

This matter is before the court on defendants' motion for partial or total summary judgment on plaintiff's claims under 42 U.S.C. § 1983, and California state law.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 22, 1990, at approximately 8:30 p.m., Sacramento Sheriff's Deputy James E. Smith and Officer Stapp had responded to a call to investigate an alleged fight when they heard a motorcycle engine revving, and then saw the motorcycle speed past them. Decedent Philip Lewis was a passenger on the motorcycle and his friend Brian Willard was the driver. Neither rider wore a helmet. Officer Stapp

yelled to the motorcyclists to pull over. The passenger Lewis stated "fuck it, let's get out of here," at which point the motorcycle accelerated past the police officers. Officer Smith and Officer Stapp pursued the motorcycle in separate squad cars in a chase lasting approximately one minute and fifteen seconds and reaching top speeds of approximately 80 to 100 miles an hour.[9] The chase traveled 1.25 miles, through four stop signs and three left hand turns. Neither officer saw the motorcycle's brake light come on during the pursuit.[10] Officer Smith attempted to notify dispatch of the pursuit as required by the Sheriff's Department pursuit policy, but his radio was on the wrong channel. Officer Smith followed the motorcycle at a distance of between 100 and 200 feet.[11] As the vehicles

[9]Plaintiffs say the vehicles reached 80 to 100 miles an hour, while defendants say the pursuit never exceeded 80 miles an hour.

[10]The parties' experts dispute whether the motorcycle's brake light was working. Defendants' expert stated that the brake light was rigged to stay on whenever the engine was on, and plaintiffs' expert stated that the brake light could not possibly be installed to be on all the time.

[11]Defendants claim that Officer Smith maintained a 200-foot distance behind the motorcycle, while one witness reported that the

went over a crest in the road, Officer Smith saw the motorcycle making a left turn and stopping. He saw smoke coming from the rear tire and passenger Lewis jumping backward or being thrown backward. Officer Smith then braked heavily, skidding 166 feet but he was unable to stop before his squad car struck Philip Lewis. Lewis was pronounced dead at the scene.

Decedent Lewis' representatives filed the instant suit under 42 U.S.C. § 1983 and California state law on March 11, 1991. Plaintiffs' first cause of action alleges that Officer Smith's reckless conduct deprived decedent of his Fourteenth Amendment substantive due process rights.[12] The second cause of action is a Monell-type claim against the county defendants alleging inadequate officer training and a policy amounting to

---

patrol car was 100 feet behind the motorcycle.

[12]As a precautionary measure, defendants also move for summary judgment on any Fourth Amendment claim plaintiffs may have alleged. In support of their motion, defendants argue that plaintiffs cannot show decedent was "seized." See Brower v. County of Inyo, 489 U.S. 593 (1989). However, because the court finds no mention of a Fourth Amendment violation in plaintiffs' complaint and because the complaint failed to notify defendants of any Fourth Amendment unlawful seizure claim, the court does not address the Fourth Amendment issue.

deliberate indifference to decedent's constitutional rights. Plaintiffs' third cause of action alleges that Officer Smith negligently operated his police car. Defendants now move for partial or total summary judgment on the grounds addressed below.

II. ANALYSIS

A. Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). It is the moving party's burden to inform the district court of the bases for its motion and to identify those facts that it believes demonstrate the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets its initial responsibility, then the burden shifts to the opposing party to establish that there is a genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). To establish a factual dispute, the opposing party must tender

evidence of specific facts showing a dispute exists and the court should believe those facts, drawing all reasonable inferences in favor of the opposing party. Matsushita Elec. Indus. Co., 475 U.S. at 586-87; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

B. Good Faith Qualified Immunity

Defendant Officer Smith contends he should be accorded good faith qualified immunity from plaintiffs' Fourteenth Amendment claim. Peace officers are entitled to qualified immunity from constitutional claims under 42 U.S.C. § 1983, if their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have know. Hunter v. Bryant, 112 S.Ct. 534 (1991). The test for determining whether good faith qualified immunity applies in a given case involves three inquiries:

> (1) the identification of the constitutional right allegedly violated;
>
> (2) the determination of whether the right was so clearly established as to alert a reasonable officer to its constitutional parameters; and
>
> (3) the ultimate determination of whether a reasonable officer could have believed that his particular conduct was lawful.

Romero v. Kitsap, 931 F.2d 624, 627 (9th Cir. 1991). "[R]egardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful." Romero v. Kitsap, 931 F.2d at 627. The plaintiff bears the burden of proving that at the time of the alleged misconduct, the right allegedly violated was "clearly established." Romero v. Kitsap, 931 F.2d at 627. If plaintiff meets this burden, the officer must show that his or her conduct was reasonable despite the fact it may have violated constitutional rights. Romero v. Kitsap, 931 F.2d at 627.

Defendant Officer Smith asserts that he is entitled to good faith qualified immunity because (1) plaintiffs have not proven that he violated any of decedent's constitutional rights; (2) even if plaintiffs could identify a constitutional right that was violated, that right was not "clearly established" at the time of the alleged violation; and (3) a reasonable officer would have believed Officer Smith's conduct was lawful. Plaintiff's alleged that Officer Smith violated decedent's Fourteenth Amendment right to not be deprived of life without substantive due process of

law. Assuming, without deciding, this violation occurred, the inquiry turns to whether plaintiff's constitutional right was "clearly established" at the time of the alleged misconduct.

To determine whether a right was "clearly established" at the time of the alleged violation, the court looks to binding precedent as well as to "all available decisional law including decisions of state courts, other circuits, and district courts . . . . " Ward v. County of San Diego, 791 F.2d 1329, 1333 (9th Cir. 1986). Plaintiffs present, and this court finds, no state or federal opinion published before May, 1990, when the alleged misconduct took place, that supports plaintiffs' view that they have a Fourteenth Amendment substantive due process right in the context of high speed police pursuits. Moreover, the court has no obligation to independently research the relevant law of qualified immunity when the plaintiff has the burden of proof. Elder v. Holloway, 975 F.2d 1388, 1398 (9th Cir. 1991).

Since 1990, only one district court has visited the issue of a Fourteenth Amendment violation in the context of a high speed police chase. See Frye v. Town of Akron, 759 F. Supp. 1320 (N.D.Ind. 1991). With facts

strikingly similar to the facts in this case, the Frye court denied defendants' motion to dismiss, holding that plaintiffs may be able to establish a Fourteenth Amendment violation. Frye v. Town of Akron, 759 F.2d at 1325. However, not only was the case decided after the alleged misconduct here, but given the procedural posture of the case, it fails to "clearly establish" any specific Fourteenth Amendment right in the context of police pursuits. See Monell v. Dept. of Social Servs., 436 U.S. 658 (1978). A municipality may be liable for actions resulting in deprivation of constitutional rights only when the injurious conduct of its official or agent Plaintiffs can not show that decedent's Fourteenth Amendment rights were "clearly established," therefore, Officer Smith is entitled to summary judgment on the basis of qualified immunity on plaintiffs' Fourteenth Amendment claim.

C. Municipality Liability for Failure to Train Officers

Defendants County of Sacramento and Sacramento County Sheriff's Department contend they are immune from plaintiffs' Monell claim because Officer Smith did not act pursuant to a government policy or custom and his conduct did not evidence implicit governmental

authorization of, approval of, or acquiescence in, unconstitutional activity. is executed pursuant to a "government's policy or custom." Monell, 436 U.S. at 694. To establish municipal liability under § 1983, a plaintiff must show that: (1) he was deprived of a constitutional right; (2) the municipality has a policy; (3) the policy "amounts to deliberate indifference" to plaintiff's constitutional rights; and (4) the policy is the moving force behind the constitutional violation. Oviatt v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1991); see also City of Canton v. Harris, 389 U.S. 378 (1986). Inadequate police officer training may give rise to municipal liability if the failure to train reflects a "'deliberate' or 'conscious' choice by a municipality -- a 'policy'. . . ." City of Canton, 389 U.S. at 389. "[T]he need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." City of Canton, 389 U.S. at 390, n. 10 (citation omitted). In determining inadequate training "the issue is not whether the officers had received any training . . . rather the issue is the adequacy of the training." Davis v.

Mason County, 927 F.2d 1473, 1483 (9th Cir. 1991).

Plaintiffs assert that County defendants failed to adequately train Officer Smith. Like the officers in Davis, Officer Smith had no training in pursuits. However Davis can be distinguished, in that the officers in Davis received "minimal or no training," Davis, 927 F.2d at 1483, whereas the officer in this case, received the Sheriff's Department's standard training in high speed driving in 1979 and 1976. While training in high speed driving is not identical to specific pursuit training, this court recognizes that many of the driving skills overlap. Furthermore, defendants argue that since officer Smith has been employed by the Sacramento County Sheriff's Department for 20 years, he had on-the-job training as well. The training procedures implemented by the County of Sacramento and Sacramento County Sheriff's Department exceed state requirements and are not so inherently inadequate as to subject the municipality to liability for a failure to train.

Plaintiffs also seem to contend that the Sacramento County Sheriff's Department's pursuit policy is deliberately indifferent to decedent's constitutional rights. However,

the Sheriff's Department's pursuit policy complies with, and exceeds, California statutory standards. That policy carefully delineates when it is permissible to initiate a pursuit, and when an officer should call off a pursuit because of the threat of harm to the suspect, the officer, and the public at large. Moreover, the policy does not violate any constitutional rights previously established by precedent. Therefore, the County's motion for summary judgment on plaintiffs' § 1983 claim is granted.

Because Officer Smith is entitled to good faith qualified immunity and the County adequately trained Officer Smith and does not have a policy that evidences deliberate indifference to constitutional rights, the court need not address the separate ground for summary judgment that Officer Smith's pursuit and actions did not violate Lewis' Fourteenth Amendment substantive due process rights.

D. Immunity from State Law Negligence Claims

Defendants assert that various state immunity statutes apply to shield them from liability for state law negligence claims. Defendant Officer Smith asserts that he is immune from liability for plaintiffs' negligence claim pursuant to Cal. Veh. Code § 17004 because he was in immediate pursuit of

law violators while on duty in his patrol car. Cal. Veh. Code § 17004 provides:

> A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law . . .

The undisputed facts how that (1) Officer Smith was a public employee in the line of duty when he pursued Willard and Lewis; and (2) Willard violated the law by committing two infractions beyond the failure to yield. Therefore, Officer Smith is immune from plaintiffs' negligence claim.

Notwithstanding Officer Smith's tort immunity, any negligence on his part is relevant to the liability of the County defendants. City of Sacramento v. Superior Court, 182 Cal.App.3d 395 (1982) (though section 17004 immunized negligent officers, the city was still held liable). Defendants County of Sacramento and Sacramento County Sheriff's Department contend that they are entitled to immunity from plaintiffs' negligence action under Cal. Gov't Code § 845.8(b) and Cal. Veh. Code § 17004.7. In

light of the court's disposition of all federal claims, as discussed in the following section, the court does not decide whether the County defendants are immune from negligence liability, as the state courts are in a better position to interpret the intertwined immunity statutes than a federal court. Therefore, the County defendant's motion for summary judgment on plaintiffs state law negligence claims is denied.

E. Dismissal of Remaining State Law Claims

The Constitution empowers federal courts to hear supplemental state claims if the "state and federal claims . . . derive from a common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). However, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisditional sense, the [supplemental] state claims should be dismissed as well." United Mine Workers, 383 U.S. at 726. The exercise of supplemental jurisdiction is within the discretion of the trial court. United Mine Workers, 383 U.S. at 726. The Ninth Circuit has held that it is proper to dismiss the supplementa state claims when all federal claims are dismissed before trial. Johnson v. Director, OWCP, 911 F.2d 242, 247 (9th Cir. 1990); Jones v. Community

Redevelopment Agency, 733 F.2d 646, 651 (9th Cir. 1984). As plaintiffs' federal causes of action do not survive summary judgment, the court exercises its discretion and dismisses plaintiffs' remaining state claim against County of Sacramento and Sacramento County Sheriff's Department.

III. CONCLUSION

Defendants' motion for summary judgment is hereby:

(1) GRANTED, as to plaintiffs' federal and state causes of action against defendant Officer Smith;

(2) GRANTED, as to plaintiffs' §1983 claim against County of Sacramento and Sacramento County Sheriff's Department;

(3) DENIED, as to plaintiffs' state negligence claim against County of Sacramento and Sacramento County Sheriff's Department.

Finally, since the only claim which survives summary judgment is a pendent state law claim, the court exercises its discretion to dismiss this claim without prejudice. Plaintiffs may file their negligence claim in state court.

IT IS SO ORDERED.

Dated: April 10, 1993

/S/ GARLAND E. BURRELL, JR.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of Philip Lewis, Plaintiffs- Appellants, v. SACRAMENTO COUNTY; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT; JAMES E. SMITH, Defendants-Appellees.	No. 93-15924 D.C. No. CV- 91-00505-GEB O R D E R

FILED
NOV 21 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: SCHROEDER, PREGERSON, and WIGGINS, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
APR 22 1997
CLERK

No. 96-1337

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL L. BAUM
Counsel of Record
PAUL J. HEDLUND
BAUM, HEDLUND, ARISTEI, GUILFORD & DOWNEY
Attorneys for Respondents
12100 Wilshire Boulevard, #950
Los Angeles, California 90025
(310) 207-3233

71033
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

TABLE OF CONTENTS

	Page
Table of Citations	ii
Petitioners' Version of the Facts is Inaccurate	1
Reasons for Denying the Writ	1
I. There Is No Conflict Justifying The Grant Of Certiorari.	2
II. Review Is Not Warranted; The Standard Of Care Necessary To Prove A Violation Of Substantive Due Process Under The Fourteenth Amendment Articulated by The Ninth Circuit Is Both Sound And Uncontradicted.	2
A. There Is No Conflict With This Court. ...	2
B. There Is No Conflict Within The Circuits.	5
1. A Conflict In Dicta Is Not An "Important Matter" Under Rule 10.	6
2. Deliberate Indifference/Shocks The Conscience: A Distinction Without A Difference.	7
III. Review Is Not Warranted; There Is No Rule 10 Conflict Regarding Qualified Immunity.	8

Contents

Page

IV. Review Is Not Warranted: Since At Least 1990, A Reasonable Police Officer Clearly Knew That Running Down And Killing A Passenger On A Motorcycle With A Police Vehicle During A High Speed Chase Violated The Fourteenth Amendment Rights Of That Person. 9

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989) 5

Collins v. City of Harker Heights, Texas, 503 U.S. 115, 112 S. Ct. 1061 (1992) 2, 3, 4, 5

Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662 (1986) 4, 5

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996) 5, 6

Fagan v. City of Vineland, 22 F.3d 1296 (3rd Cir. 1994) 5, 6

Mendoza v. Block, 27 F.3d 1357 (9th Cir. 1994) 9

Temkin v. Frederick County Commissioners, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) 5, 6

Contents

Page

United States Constitution Cited:

Fourth Amendment 8

Fourteenth Amendment 1, 2, 3, 8, 9

Rule Cited:

Supreme Court Rule 10 .....2, 5, 6, 8, 9

Other Authorities Cited:

Black's Law Dictionary, Sixth Edition, Centennial Edition, 1991, page 104 4

Legal Method. Foundation Press, 1980 6

Webster's Ninth Collegiate Dictionary, Merriam Webster, Inc. 1987, page 99 4

PETITIONERS' VERSION OF THE FACTS IS INACCURATE

In a hyperbolic rendition of the "facts", Petitioners have inappropriately included material that was not cited in the Ninth Circuit opinion. In so doing, Petitioners seek inappropriately to justify Officer Smith's conduct by relating his thoughts and other "facts" Petitioners apparently believe mitigate his responsibility for young Philip Lewis' death. Respondent respectfully requests this Court to consider only the facts as relied upon by the court below.

In addition, Petitioners never mention that Officer Smith *killed* 16 year old Philip. Rather, they hide behind the euphemism that he "died of his injuries". Most people would die of their injuries if, as an unprotected passenger/pedestrian, they were hit by a police car skidding out of control at 65 miles per hour rupturing virtually every organ and breaking every bone in their body.

Respondents are further troubled by Petitioner's inaccurate and misleading citations to the Appendix. *See* Petition, page 6.

REASONS FOR DENYING THE WRIT

Petitioners' position is flatly incorrect — the decision below is in accordance with the body of law that has developed governing violations of substantive due process under the Fourteenth Amendment, both in this Court and in the other circuits. Any difference between the decision of the Ninth Circuit, this Court and/or any of the other circuits is inconsequential and does not warrant review by this Court.

I.

THERE IS NO CONFLICT JUSTIFYING THE GRANT OF CERTIORARI.

Petitioners invoke the "in conflict" provision of Rule 10 to support their petition for review as to the standard for determining a violation of substantive due process under the Fourteenth Amendment. However, Petitioners have relied upon a superficial reading of the holdings of the cases they cite. A careful analysis of these cases shows that there is no such conflict.

II.

REVIEW IS NOT WARRANTED; THE STANDARD OF CARE NECESSARY TO PROVE A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT ARTICULATED BY THE NINTH CIRCUIT IS BOTH SOUND AND UNCONTRADICTED.

A. There Is No Conflict With This Court.

There is no conflict between the decision in the court below and any decisions of this Court. This Court has never addressed the minimum standard for establishing a constitutional violation occurring because of a high speed police pursuit. The cases in which this Court has addressed instances of wrongdoing of constitutional dimensions have been in other contexts. The decision of the lower court in this case is entirely consistent with those holdings.

Petitioners cite a single opinion by this Court which they claim contradicts the lower court's decision, *Collins v. City of*

Harker Heights, Texas, 503 U.S. 115, 112 S. Ct. 1061 (1992). In that case, this Court commented that in order to justify an expansion of liability to a municipality for violation of the due process clause of the Fourteenth Amendment, the conduct in question must be "arbitrary or conscience shocking". *Collins*, 503 U.S. at 128. Petitioners, however, in a Procrustean attempt to amputate the part of this Court's test which does not fit their argument, claim that only conduct which is "conscience shocking" violates substantive due process. Petitioners totally ignore this Court's comment that arbitrary conduct is likewise constitutionally impermissible.

In *Collins*, this Court said that it was not persuaded that the alleged failure by the City of Canton to train its employees ". . . can properly be characterized as arbitrary or conscience-shocking . . ." *Collins*, 503 U.S. at 128. Petitioners have excised only the "conscience-shocking" portion of that phrase, arguing that this is the test that the Ninth Circuit should have applied to Officer Smith's actions. Petitioners do not explain why they have deleted the words "arbitrary or" from their argument.

In addition, the *Collins* case does not set a standard to judge whether the conduct of individual police officers violated substantive due process rights. Rather, the case addresses the necessary dichotomy between constitutional violations on the one hand and common law tort claims on the other. Furthermore, it does so, not as to the individual liability of public employees to members of the public, but only as to the very narrow question of liability of a municipality to one of its own employee and in the context of *extending* Fourteenth Amendment protection to a right to proper training.

Petitioners cite only the second half of the test they claim was developed by this Court in *Collins*. They completely ignore the first part, which they apparently find not to conflict with the "deliberate indifference" standard in the opinion below.

Either the phrase "arbitrary or conscience-shocking" is one category of conduct or two. Either way, this standard does not conflict with the "deliberate indifference" test in the court below.

If the phrase describes a single category, then this Court equated governmental conduct which is arbitrary with conduct which is conscience-shocking. Clearly, police conduct that is deliberately indifferent to the constitutional rights of individuals is arbitrary. The word "arbitrary" is defined by Black's Law Dictionary, Sixth Edition, Centennial Edition, 1991, page 104, as "[i]n an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle . . ." and by Webster's Ninth Collegiate Dictionary, Merriam Webster, Inc. 1987, page 99, as "depending on individual discretion . . . and not fixed by law . . . based upon or determined by individual preference or convenience rather than by necessity of the intrinsic nature of something . . ." Clearly, these definitions ring of conduct done by a government in "deliberate indifference" to the rights of the governed, especially in this case where the officer was admittedly out of compliance with his own department's policy.

If the phrase defines two separate categories, then there is no rationale for concluding that "arbitrary" is an inadequate level of wrongful conduct to support a constitutional claim, while the conduct stated in the alternative to it, "conscience-shocking", is constitutionally sufficient. To conclude otherwise would be to render the phrase internally inconsistent and contradictory.

Neither can it be said that constitutionally impermissible conduct must be both arbitrary *and* conscience-shocking to be actionable. The terms are joined by the disjunctive "or" in *Collins*. Furthermore, there is no mention in *Collins* that this Court was departing from its previous holding in *Daniels v.*

Williams, 474 U.S. 327, 106 S. Ct. 662 (1986), where it was observed that "[t]he touchstone of due process is protection of the individual against *arbitrary* action of government". *Daniels*, 474 U.S. at 331 (emphasis added). Accordingly, it appears that the addition in *Collins* of "or conscience-shocking" is a mere amplification of, not material change to, this Court's holding in *Daniels*.

Likewise, Petitioners' argument that the Ninth Circuit erred in relying on this Court's decision of *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989) is misplaced. This is a discretionary writ, not an appeal. This is neither the time nor the place for Petitioners to argue that the decision of the court below was wrong. Yet, Petitioners' argument about the Ninth Circuit's reliance on *Harris* is just that: an assignment of error for adopting a "deliberate indifference" standard. They base their argument in part on the fact that the deliberate indifference test enunciated in *Harris* involved injury in a custodial context. The harmony of holdings between these decisions, while they may not be music to Petitioners' ears, is the exact opposite of the discord necessary under Rule 10 for this Court's discretionary review.

B. There Is No Conflict Within The Circuits.

Petitioners list three circuit court cases which they claim conflict with the opinion below. These cases, *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996); *Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir. 1994) (en banc) and *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) are not in conflict with this case for two reasons: (1) the standard discussed in the First, Third and Fourth Circuit cases is *mere dicta;* and (2) there is no fundamental difference between "deliberate indifference" and "shocks the conscience".

1. A Conflict In Dicta Is Not An "Important Matter" Under Rule 10.

Rule 10 reflects this Court's concern that its discretionary powers not be invoked unless a conflict exists regarding an "important matter". Here, the "conflict" in the decisions in the First, Third, Fourth and Ninth Circuit is more illusory than real. The actual holdings of these circuits are tied together by a key consensus: liability for constitutional torts requires conduct more culpable than mere negligence.

A close review of the *Evans*, 100 F.3d 1033 at 1038 (decision to engage in "hot pursuit" was "no more than mere negligence"); *Fagan*, 22 F.3d 1296 at 1307 (decision to pursue was not arbitrary but merely a mistake); and *Temkin*, 945 F.2d 716 at 723 (officers' conduct was "lacking in judgment"), reveals that each of those cases found that, under the circumstances present, the pursuing officers were no more than negligent. This fact alone compelled a finding of no liability. Thus, in each of these three cases, the courts' discussion of the relative merits of one extra-negligence standard over another was mere dicta. Only in the Ninth Circuit decision in *Lewis* did the court find that the governmental conduct, at least for purposes of summary judgment, potentially went beyond mere negligence, allowing for a jury determination on this point.

As has been observed by the authors of Legal Method. Foundation Press, 1980, "[i]t is a cardinal tenet of the Anglo-American judicial system that the best result will be produced through the 'fire of controversy' . . . Dicta are pronouncements on points that need not be considered in order to reach a decision . . ." Clearly, when conduct does not rise above a universally agreed-upon floor, what more egregious conduct would have sufficed is immaterial, was not in controversy and need not have been addressed by these courts.

Respondents, therefore, respectfully submit that there can be no genuine conflict between the circuits, since the Ninth Circuit in the case below is the only court to have issued an opinion directly holding what standard is to be applied in police pursuit cases when, as a matter of law, the officer's conduct amounts to more than mere negligence.

2. Deliberate Indifference/Shocks The Conscience: A Distinction Without A Difference.

Based upon the above discussion concerning the definition and use of the word "arbitrary" by this Court, it is clear that there is no appreciable difference between "arbitrary" and "deliberate indifference" as standards for judging constitutional violations. Since "arbitrary" and "shocks the conscience" have also been used disjunctively by this Court in the constitutional context, there can be no meaningful distinction between "shocks the conscience" and "deliberat indifference".

That these terms can be used interchangeably in triggering Constitutional liability is supported by common sense. While intentional misconduct shocks the conscience of the civilized in society (or should if we have not become accustomed to it), so too does a government's arbitrary or deliberate indifference to the rights of its citizens.

The relationship between those who govern and those who are governed makes conduct by the former that is less than intentional more egregious to the latter than if a private citizen engaged in the same conduct. Arbitrary or deliberately indifferent conduct by a stranger can be passed off as unfortunate, but not outrageous. However, when such conduct comes from the very group that is paid by the citizenry to provide protection from that type of conduct under color of law, it shocks the conscience. "Shocks the conscience" is therefore, not a test

separate and apart from "arbitrary" or "deliberate indifference". It is simply another way of describing such conduct.

It is shocking that Amici will go even further than Petitioners to grant police officers constitutional immunity for all harm caused while engaged in official duties except for liability under the Fourth Amendment for deliberate seizures. Amici assert this position on the pretext that the Constitution must add " 'a substantial increment of protection' " not otherwise available under the Bill of Rights. (County Amici Brief, p. 17.) This argument fails for two reasons. First it is the Bill of Rights which guarantees the rights to Life and Liberty which rights are then incorporated in the Fourteenth Amendment. Second, Amici contend that California State law immunizes officers during high-speed chases, which would render the Fourteenth Amendment the *only* protection afforded victims like Philip Lewis.

III.

REVIEW IS NOT WARRANTED; THERE IS NO RULE 10 CONFLICT REGARDING QUALIFIED IMMUNITY.

Petitioners' argument supporting their request for review of the decision of the court below denying qualified immunity for Officer Smith is fatally flawed. Rule 10 does not support review except where there are decisions in conflict on the *same* "important matter". Here, there are no other cases on the issue of qualified immunity in this context with which the Ninth Circuit opinion could conflict.

In an attempt to create a conflict, Petitioners review cases that Officer Smith could have been guided by in 1990 and assert that these cases are so inconsistent that the law was unclear.

However, the most that Petitioners' argument shows is that Officer Smith must have been aware that his conduct *could* be held violative of the Fourteenth Amendment which, of course, is exactly what the Ninth Circuit concluded. It is not necessary that Officer Smith had to know that liability was an absolute certainty.

The fact that there were varying results in cases brought against police officers prior to May, 1990 does not create the conflict envisioned by Rule 10 to trigger review by this Court. Without a true Rule 10 conflict, discretionary review by this Court is not warranted.

IV.

REVIEW IS NOT WARRANTED: SINCE AT LEAST 1990, A REASONABLE POLICE OFFICER CLEARLY KNEW THAT RUNNING DOWN AND KILLING A PASSENGER ON A MOTORCYCLE WITH A POLICE VEHICLE DURING A HIGH SPEED CHASE VIOLATED THE FOURTEENTH AMENDMENT RIGHTS OF THAT PERSON.

Petitioners seek review on the ground that the law regarding police officer liability needs to be clarified. Yet, Petitioners do not cite authority for such a basis for review. Furthermore, "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury" *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994). Furthermore, the cases prior to May 1990 were sufficient to establish conduct during a high speed pursuit as potentially violative of the Fourteenth Amendment.

While it is true that the reasons listed in Rule 10 are not, by their very terms, exhaustive, it is also true that Rule 10 is not designed to promote advisory opinions. Since there is no conflict

between the decision below, decisions of this Court or decisions of any circuit, discretionary review by this Court is not warranted.

CONCLUSION

Petitioners have wholly failed to present any basis under Rule 10 for this Court to grant its Petition. Petitioners are attempting to obtain an appeal of the partial reversal of the district court's order granting their Motion for Summary Judgment. The Petition should be denied.

Respectfully submitted,

MICHAEL L. BAUM
Counsel of Record
PAUL J. HEDLUND
BAUM, HEDLUND, ARISTEI,
GUILFORD & DOWNEY
Attorneys for Respondents
12100 Wilshire Boulevard, #950
Los Angeles, California 90025
(310) 207-3233

(19)

Supreme Court, U.S.
FILED
MAY 9 1997
OFFICE OF THE CLERK

NO. 96-1337

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,
Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS

Respondents,

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit,

---

PETITIONERS' REPLY MEMORANDUM

Terence J. Cassidy*
Marcos A. Kropf
Porter, Scott, Weiberg & Delehant
350 University Avenue, Suite 200
Sacramento, CA 95825
Telephone: (916)929-1481
Attorney for Petitioners
*Counsel of Record

7pp

In its Brief in Opposition, Respondent requests that this court consider only the facts cited in the Ninth Circuit Opinion. While Petitioner is mindful that the standard of review requires that the facts be taken in the light most favorable to the Respondent, there are certain undisputed facts in the record which are not cited in the Ninth Circuit Opinion. Petitioners respectfully submit that it has accurately set forth the facts in the record before the District Court and the Court of Appeal to allow for a full and fair determination regarding whether this petition should be granted. Petitioners hereby briefly respond to the new points raised in Respondents' Brief in Opposition.

First, Respondent submits that Petitioner's purported failure to address the first part of the legal standard enunciated in *Collins*, the words "arbitrary or", implies that Petitioners concede that portion of the test is not in conflict with the "deliberate indifference" standard adopted by the Ninth Circuit in this case. *Collins v. City of Harker Heights, Texas*, 503 U.S. 115; 112 S.Ct. 1061 (1992). Respondents also argue that the conduct which is deliberately indifferent is arbitrary. Regardless of whether the terms "arbitrary" and "conscience shocking" are joined in the disjunctive or conjunctive, this court characterized the nature of a claim for deprivation of substantive due process to be whether the government actor's "deliberate indifference" to the right of the individual constituted arbitrary government action that 'shocks the conscience' of federal judges. See *Collins, supra*, 503 U.S. at 126, 112 S.Ct. at 1069. It is thus clear from *Collins* that in order to support a claim for an alleged denial of substantive due process, the conduct that is

deliberately indifferent must also rise to the level of arbitrariness in a constitutional sense. Conduct which is arbitrary in a constitutional sense is synonymous with conduct that must "shock the conscience" of federal judges, and is beyond the threshold of "deliberate indifference necessary to establish municipal liability or a violation under the Eighth Amendment. *Collins, supra*, 503 U.S. at 126-129; 112 S.Ct. 1069-1071. Moreover, apart from the opinion by the Ninth Circuit in this case, the other circuit court cases addressing the issue of the legal standard for a deprivation of substantive due process have uniformly characterized the test as "shocks the conscience" and do not attempt to separate the word "arbitrary" from the standard. See *Evans v. Avery*, 100 F.3d 1022, 1037-1039 (1st Cir. 1996); *Uhlrig v. Harder*, 64 F.3d 567, 573 (10th Cir. 1995) cert. denied, _ U.S. _, 116 S.Ct. 924 (1996); *Fagan v. City of Vineland*, 22 F.3d 1296, 1303-1305 (3d Cir. 1994) (en banc)(and cases cited therein).

Respondents also submit that there is no meaningful distinction between the definitions of the legal standards of "shocks the conscience" and "deliberate indifference." This type of confusion is precisely why review by this court is warranted in this case. Although Respondents believe the legal standard regarding conduct that "shocks the conscience" and "deliberate indifference" is the same, the Circuit Courts of Appeal who have addressed that issue since *Collins* have clearly found that "shocks the conscience" and "deliberate indifference" are separate elements of the test to determine a deprivation of substantive due process. See *Evans v. Avery, supra*, 100 F.3d

at 1037-1038 (specifically noting that "shocks the conscience" is an additional element); *Uhlrig v. Harder, supra*, 64 F.3d at 574, (noting the additional requirement of conduct that is conscience shocking and setting forth five elements to establish a claim for substantive due process with element four as reckless disregard and element five as conduct that is conscience shocking).

Respondents also submit that any conflict between the Circuit Courts of Appeal involves dicta and therefore is not an important matter under Rule 10. Petitioners respectfully submit that the holdings in *Evans, Fagan* and *Tempkin* were not merely dicta. Rather, it was necessary for the courts in each of those cases to establish the legal standard before analyzing whether the facts of that particular case were sufficient to meet that standard if accepted by a trier of fact. Parenthetically, Petitioners assume that if Respondents were attempting to avoid qualified immunity with respect to a police pursuit occurring after those decisions, then Respondents would assert that the law was clearly established by the holdings in those cases.

In addition, Respondents' position that the holdings in *Fagan* and *Tempkin* as to the legal standard to establish a deprivation of substantive due process in police pursuit cases was mere dicta lends support to Petitioners' request for review regarding denial of qualified immunity to Officer Smith. If the determination of the legal standard of "shocks the conscience" applicable to a deprivation of substantive due process in police pursuit cases as determined in the *Fagan* and *Tempkin* cases is mere dicta, then according to Respondents, the law was not

clearly established until the decision by the Ninth Circuit in this case. As more fully set forth in the Petition for Writ of Certiorari in this case, case law available at the time of this pursuit in May, 1990, involved several legal standards as well as numerous factual scenarios which likewise demonstrate the law was not clearly established within the meaning of qualified immunity. See e.g. *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1556-1557 (11th Cir. 1993).

The decision by the Ninth Circuit Court of Appeals in this case has expanded the scope of claims under the Fourteenth Amendment to those which would ordinarily involve state tort law under the guise of a legal standard of "deliberate indifference" or "reckless disregard." In so doing, the decision by the Ninth Circuit will have a chilling affect on the proper scope of law enforcement duties in the apprehension of fleeing suspects. Based on the reasoning by the Ninth Circuit, the fact that suspects Willard and Lewis were operating the motorcycle in a manner which created a substantial risk of injury to both themselves and other innocent bystanders may necessarily have required Officer Smith to abandon the pursuit and allow them to make good their escape. To that end, a fleeing misdemeanant, who intentionally places him or herself and other innocent bystanders in harms way by accelerating to an extremely high rate of speed will now be encouraged to do so to make good the escape since that will necessitate that the officer abandon the pursuit to avoid any potential liability. Thus, a fleeing suspect is encouraged to create a more dangerous situation. Moreover, in light of the inherent risk involved in apprehending a fleeing

suspect in the context of a hot pursuit, virtually all factual scenarios would potentially lead to a question of fact for the jury as to whether the officer acted with "deliberate indifference," as exhibited by the cases recently reversed by the Ninth Circuit Court of Appeals. See *Onossian v. Block*, 103 F.3d 140 (9th Cir. 1996) and *Torres v. Bonnilla*, 103 F.3d 141 (9th Cir. 1996). Petitioners submit that the consequences of expanding liability under the due process clause and simultaneously encouraging lawlessness has never been the intention of this court.

Petitioners have established several important reasons why review by this court is warranted in this case. Review is necessary to resolve the conflict between the legal standard adopted by this court to establish a violation of substantive due process under the Fourteenth Amendment in *Collins v. City of Harker Heights, TX, supra*, and the lesser standard adopted by the Ninth Circuit in its opinion in this case. Review is also necessary to resolve the actual conflict in that standard between the Circuit Courts of Appeal. The Ninth Circuit has expanded the concept of substantive due process whereas the First, Third, Fourth and Tenth Circuit Courts of Appeal have required the additional element of conduct that "shocks the conscience" thereby narrowing potential claims for deprivations of substantive due process and adhering to the principals of *Collins*. Lastly, review is warranted to clarify the application of qualified immunity in this case where there are conflicting standards of law and conflicting standards of conduct such that the contours of the legal standard was not clearly established.

Wherefore, Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Dated: May 9, 1997 Respectfully submitted,

Terence J. Cassidy*
Marcos A. Kropf
PORTER, SCOTT,
WEIBERG & DELEHANT
A Professional Corporation
350 University Avenue, Suite 200
Sacramento, CA 95825
(916) 929-1481

*Counsel of Record *Attorneys for Petitioners*

No. 96-1337

Supreme Court, U.S.
FILED
MAR 20 1997
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

Petitioners,

v.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE COUNTY OF RIVERSIDE, COUNTY OF SAN DIEGO AND CITY OF LOS ANGELES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN J. SANSONE
County Counsel
County of San Diego
DIANE BARDSLEY
Chief Deputy
1600 Pacific Highway
Room 355
San Diego, CA 92101
(619) 531-4847

WILLIAM C. KATZENSTEIN
County Counsel
Office of County Counsel
County of Riverside
3535 10th Street, Suite 300
Riverside, CA 92504
(909) 275-6300

JAMES K. HAHN
City Attorney
G. DANIEL WOODARD
Senior Assistant City Attorney
GREGORY P. ORLAND
Deputy City Attorney
City of Los Angeles
200 North Main Street
18th Floor
Los Angeles, CA 90012-4131
(213) 485-5452

GREINES, MARTIN, STEIN & RICHLAND LLP
TIMOTHY T. COATES
9601 Wilshire Boulevard, Suite 544
Beverly Hills, CA 90210
(310) 859-7811

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

QUESTIONS PRESENTED

I. Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment is "shocks the conscience" as determined by this Court in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S. Ct. 1061 (1992) and other Circuit Court cases or is "deliberate indifference" or "reckless disregard" as determined by the Ninth Circuit in this case?

II. Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment was clearly established for purposes of granting qualified immunity to a peace officer when there is a conflict in that legal standard between the decision by this Court in *Collins* and by other Circuit Courts of Appeal requiring conduct that "shocks the conscience" and the holding by the Ninth Circuit in this case that the conduct be "deliberately indifferent."

III. Whether a peace officer involved in a police pursuit is entitled to qualified immunity when a reasonable officer could not have known he may be violating the law due to conflicting legal standards of conduct and where the factual contours of the legal standard are not sufficiently defined.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
BRIEF OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. THE NUMBER OF POLICE VEHICULAR PURSUITS AND THE IMPACT OF SUCH PURSUITS ON DAY-TO-DAY LAW ENFORCEMENT EFFECTIVENESS REQUIRE THAT CERTIORARI BE GRANTED TO RESOLVE A CLEAR CONFLICT AMONG THE FEDERAL APPELLATE COURTS CONCERNING THE STANDARD OF LIABILITY UNDER THE DUE PROCESS CLAUSE AND SCOPE OF QUALIFIED IMMUNITY FOR INITIATING, CONDUCTING AND TERMINATING PURSUITS	7
II. CERTIORARI IS WARRANTED TO ADDRESS THE THRESHOLD ISSUE OF WHETHER THE LIABILITY OF POLICE OFFICERS STEMMING FROM POLICE PURSUITS FALLS WITHIN THE AMORPHOUS PROVISIONS OF THE FOURTEENTH AMENDMENT, OR WHETHER CONSTITUTIONAL CLAIMS ARE CONFINED TO THE EXPLICIT TEXTUAL LIMITATIONS OF THE FOURTH AMENDMENT	13
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES	
Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807 (1994)	*passim*
Berman v. City of Daly City, 21 Cal. App. 4th 276, 26 Cal. Rptr. 2d 493 (1993)	18
Billester v. City of Corona, 26 Cal. App. 4th 1107, 32 Cal. Rptr. 2d 121 (1994)	18
Britt v. Little Rock Police Department, 721 F. Supp. 189 (E.D. Ark. 1989)	11
Brower v. County of Inyo, 489 U.S. 593 (1989)	5, 13, 17
Brumer v. City of Los Angeles, 24 Cal. App. 4th 983, 29 Cal. Rptr. 2d 515 (1994)	18
Carrol v. Borough of State College, 854 F. Supp. 1184 (M.D. Pa. 1994), aff'd, 47 F.3d 1160 (3d Cir. 1996)	9
Collins v. City of Harker Heights, Texas, 503 U.S. 115, 112 S. Ct. 1061 (1992)	i
Colvin v. City of Gardena, 11 Cal. App. 4th 1270, 15 Cal. Rptr. 2d 234 (1992)	19
Corbin v. City of Springfield, 942 F. Supp. 721 (D. Mass. 1996)	3, 8, 10
Dismukes v. Hackathorn, 802 F. Supp. 1442 (N.D. Miss. 1992)	10, 16
Easterling v. City of Glennville, 694 F. Supp. 911 (S.D. Ga. 1986)	10
Estate of Story v. McDuffie County, 929 F. Supp. 1523 (S.D. Ga. 1996)	9
Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996)	7, 10

TABLE OF AUTHORITIES – Continued

Page

Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994) 7, 10

Frye v. Town of Akron, 759 F. Supp. 1320 (N.D. Ind. 1991) 9

Fulkerson v. City of Lancaster, 801 F. Supp. 1476 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993) 10

Galas v. McKee, 801 F.2d 200 (6th Cir. 1986) 9

Graham v. Connor, 490 U.S. 386 (1986) 5, 13, 14, 15, 16

Hicks v. Leake, 821 F. Supp. 419 (W.D. Va. 1992) 11

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 1

Jones v. Chieffo, 833 F. Supp. 498 (E.D. Pa. 1993), aff'd, 22 F.3d 301 (3d Cir. 1994) 10

Jones v. Sherril, 827 F.2d 1102 (6th Cir. 1987) 10

Lewis v. County of Sacramento, 98 F.3d 434 (9th Cir. 1996) 3, 7, 12, 19

Magdziak v. Byrd, 96 F.3d 1045 (7th Cir. 1996) ... 3, 8, 10

Medeiros v. Town of South Kingstown, 821 F. Supp. 823 (D. R.I. 1993) 9

Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990), aff'd, 940 F.2d 661 (6th Cir. 1991) 9, 16

Paul v. Davis, 424 U.S. 693 (1976), reh'g denied, 425 U.S. 985 (1976) 17

Payne v. City of Perris, 12 Cal. App. 4th 1738, 16 Cal. Rptr. 2d 143 (1993) 19

Roach v. City of Frederickstown, 882 F.2d 294 (8th Cir. 1989) 10

TABLE OF AUTHORITIES – Continued

Page

Smith v. Lexington Fayette Urban County Government, et al., 884 F. Supp. 1086 (E.D. Ky. 1995) 10

Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991), cert. denied, 502 U.S. 1095 (1992) 7, 10

Webber v. Mefford, 43 F.3d 1340 (10th Cir. 1994) 10

STATUTES

California Vehicle Code section 17004 18

California Vehicle Code section 17004.7 18

RULES

United States Supreme Court Rule 37 1

OTHER AUTHORITIES

Landry, Letitia E., "Critics Sound Alarm Over Police Chases," The Sacramento Bee, July 6, 1995, p. A12 9

Preliminary Pursuit Updates (1994, 1995, 1996) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit 8

The Evaluation of Risk, Initial Cause v. Final Outcome in Police Pursuits, Business, Transportation and Housing Agency Department of California Highway Patrol (Aug. 1995) 8, 11

W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 34, at 213 (5th ed. 1984) 17

BRIEF OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, subdivision (4), by and through their authorized law officers, the County of Riverside, the County of San Diego and the City of Los Angeles, political subdivisions of the State of California,[1] hereby respectfully request the Court to grant the Petition for Writ of Certiorari of petitioners County of Sacramento, Sacramento County Sheriff's Department and James Everett Smith in the above case. Amici are public entities in the State of California, with a collective population of over 5.5 million residents. The decision of the Ninth Circuit Court of Appeals in this case holding that the conduct of police officers in initiating, conducting and terminating a vehicular pursuit is governed by the Due Process Clause of the Fourteenth Amendment, evaluated under a "deliberate indifference" or "reckless disregard" standard and is not subject to qualified immunity has a direct and substantial effect on these amici, whose law enforcement personnel must, by necessity, engage in vehicular pursuits on a regular basis.

In addition, the general principles of law addressed in the Ninth Circuit's opinion and presented for review to this Court concerning the existence and nature of any constitutional claim arising from a police pursuit are of a substantial and continuing concern to these public entities, as well as public entities throughout the country.

---

[1] *Illinois v. City of Milwaukee*, 406 U.S. 91, 97-98 (1972) (cities and counties are "political subdivisions" of states, and hence citizens of state for purposes of diversity jurisdiction, but as subdivisions of state are not subject to mandatory original jurisdiction of Supreme Court under 28 U.S.C. § 1251(a)).

Therefore, these amici respectfully request the Court to grant the Petition for Writ of Certiorari to decide these important issues.

SUMMARY OF ARGUMENT

1. This Court has set clear guidelines on the scope of police liability for such everyday law enforcement practices as traffic stops, brief detentions for questioning, custodial interrogation, and use of both deadly and non-deadly force under the Fourth Amendment. However, there is no police practice more routinely engaged in, yet less clearly defined for liability purposes, than vehicular pursuits.

In 1994, police agencies in California engaged in over 5,000 vehicular pursuits. Indeed, during the three year period from 1994 to 1996, police personnel for amicus curiae City of Los Angeles engaged in over 2,200 vehicular pursuits. Whether this reflects an ever growing disdain for lawful authority, increased vigilance by police officers in attempting to bring law breakers to justice, or other factors, is irrelevant. What is significant is that the number of police pursuits is increasing, and they have, for better or worse, become a fixture of everyday police practice.

Unfortunately, as petitioners note in the Petition for Certiorari, the law governing this common police practice remains unsettled. The Ninth Circuit in this case has declared that initiation, continuation and termination of a police pursuit resulting in injury to a suspect may give rise to liability under the Due Process Clause of the

Fourteenth Amendment to the extent the officer's conduct was "deliberately indifferent" or constituted "reckless disregard." In contrast, the First, Third and Fourth Circuits have instead embraced a "shocks the conscience" standard for purposes of evaluating vehicular pursuits by law enforcement officers. Further, while *Lewis v. County of Sacramento*, 98 F.3d 434 (9th Cir. 1996) holds that despite this conflict the law was "clearly established" as of 1990 for purposes of denying qualified immunity, other courts have come to the opposite conclusion. *Magdziak v. Byrd*, 96 F.3d 1045, 1047, 1048 (7th Cir. 1996) [law on vehicular pursuits not clearly established as of 1993]; *Corbin v. City of Springfield*, 942 F. Supp. 721, 725-726 (D. Mass. 1996) [law not clearly established as of 1991]. Quite plainly, an officer's liability under the Constitution for making what amounts to an everyday decision whether to pursue in a particular instance should not depend upon which particular Circuit Court of Appeals eventually hears any resulting lawsuit.

Moreover, review is warranted not simply because of the large number of vehicular pursuits by police, but because of the significant role these pursuits play in the ability of police officers to effectively enforce the laws and protect public safety. In California, the vast majority of police pursuits result in felony arrests. Even though over 50% of pursuits are initiated for a traffic infraction, 73% of pursuits result in a felony arrest for a charge other than evading a police officer. It is no stretch of logic to suggest that those who flee lawful authority in a dangerous and reckless manner, generally do so because they have committed serious crimes. Thus, standards governing police liability for pursuits have a direct impact on

apprehension of those individuals who commit the most serious crimes.

In addition, rules of liability which, like those articulated by the Ninth Circuit in this case, essentially require a police officer to abandon a pursuit for a relatively minor offense such as an infraction once the suspect attempts to flee in a hazardous and reckless manner simply encourage those attempting to flee lawful authority to do so in the most dangerous manner possible. In sum, the rules of liability governing police pursuits may have an unintended impact on the ability of police officers to bring law breakers to justice and encourage greater, and more dangerous lawless behavior by those attempting to avoid being brought to account for their actions.

2. Certiorari is also warranted for a more fundamental reason – to determine if the Fourteenth Amendment governs police pursuit claims in the first place. As the decision of the Ninth Circuit in this case and those of the other circuit courts reveal, federal courts have routinely analyzed and permitted such claims under the guise of the "substantive due process" prong of the Fourteenth Amendment. Yet, a threshold question exists as to whether such claims are cognizable under the Fourteenth Amendment or any other provision of the Constitution. In *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807 (1994), the plaintiff, consistent with existing authority, asserted a malicious prosecution claim premised upon violation of the Due Process Clause of the Fourteenth Amendment. A plurality of this Court concluded however, that to the extent a malicious prosecution claim existed under the Constitution, it would fall within the confines of the

Fourth Amendment. A similar blanket assumption has been made by the plaintiffs here, as well as the Ninth Circuit and other federal circuits, as to the applicability of the Fourteenth Amendment to police pursuits that fall short of seizure, but nonetheless result in injury to a suspect.

In *Graham v. Connor*, 490 U.S. 386, 395 (1986), this Court held that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the *course* of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . rather than under a 'substantive due process' approach." In *Albright*, a plurality of the Court reaffirmed this rule holding that "where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process" must be the guide for analyzing these claims.' " *Albright*, 114 S. Ct. at 813. As the Court recognized in *Brower v. County of Inyo*, 489 U.S. 593 (1989), a police pursuit may result in liability under the Constitution within the parameters of the Fourth Amendment, where the suspect is seized, i.e., injured, as a result of intentional application of force by a police officer, such as creating a roadblock or running a suspect off the road. Amici submit that, consistent with *Graham*, *Albright* and *Brower*, the full measure of constitutional protection afforded to suspects who are pursued by police is governed by the Fourth Amendment – limiting liability to those situations where police officers intentionally take action to terminate the pursuit.

Police conduct in the context of vehicular pursuits that does not result in a seizure should not be actionable under some amorphous substantive due process standard, but instead be governed solely by state tort law. California has established strict criteria for the conduct of police pursuits, as well as liability rules designed to strike a balance between the clear need of law enforcement personnel to initiate and conduct pursuits, as well as the need to protect public safety. By essentially creating a constitutional cause of action premised upon conduct that is more properly subject to state tort law, the federal courts in general, and the Ninth Circuit specifically, have created an incentive to pursue such claims in the already overburdened federal courts. Clearly, certiorari is warranted to define and limit liability under the Constitution for the actions of police officers in initiating, conducting and terminating vehicular pursuits.

ARGUMENT

I.

THE NUMBER OF POLICE VEHICULAR PURSUITS AND THE IMPACT OF SUCH PURSUITS ON DAY-TO-DAY LAW ENFORCEMENT EFFECTIVENESS REQUIRE THAT CERTIORARI BE GRANTED TO RESOLVE A CLEAR CONFLICT AMONG THE FEDERAL APPELLATE COURTS CONCERNING THE STANDARD OF LIABILITY UNDER THE DUE PROCESS CLAUSE AND SCOPE OF QUALIFIED IMMUNITY FOR INITIATING, CONDUCTING AND TERMINATING PURSUITS.

As noted in the Petition for Certiorari, there is a striking conflict among the federal appellate courts concerning the standard to be used in resolving a due process claim under the Fourteenth Amendment stemming from injuries sustained by a suspect as a result of a vehicular pursuit by police officers. The Ninth Circuit in this case expressly held that the conduct of police officers must be evaluated under the "deliberate indifference" or "reckless disregard" standard. App. to Pet., p. 22. In contrast, the First, Third and Fourth Circuits have held that such claims must be evaluated under a "shocks the conscience" standard. *Evans v. Avery*, 100 F.3d 1033, 1038-1039 (1st Cir. 1996), Pet. for Cert. filed Feb. 28, 1997 (96-1390), *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994) (en banc), *Temkin v. Frederick County Comm'rs*, 945 F.2d 716 (4th Cir. 1991), cert. denied, 502 U.S. 1095 (1992).

In *Lewis*, the Ninth Circuit also held that the law governing police pursuits was clearly established as of 1990. App. to Pet., pp. 32-37. Yet, other federal courts, reviewing the same case law, have found the law was not

clearly established as of 1991 and 1993. See *Corbin v. City of Springfield*, 942 F. Supp. at 725-726 and *Magdziak v. Byrd*, 96 F.3d at 1047.

Obviously, a conflict among the federal appellate courts, while disturbing, might not warrant intervention by this Court if it concerned a matter that arose infrequently, or which concerned an abstract principle of significance to legal scholars, but with little practical impact on the public at large. However, few areas have as much impact on the country as a whole as the conduct of police officers in their efforts to protect public safety.

The reality of modern law enforcement practice is that vehicular pursuits now fall within the core, day-to-day activity of police officers. For example, in 1994, California law enforcement personnel engaged in at least 5,300 vehicular pursuits. See *The Evaluation of Risk, Initial Cause v. Final Outcome in Police Pursuits*, Business, Transportation and Housing Agency Department of California Highway Patrol (Aug. 1995) (hereafter "Evaluation of Risk"), p. 1.[2] Indeed, law enforcement officers for amicus curiae City of Los Angeles initiated over 2,200 vehicular pursuits over a three year period from 1994 through 1996. *Preliminary Pursuit Updates* (1994, 1995, 1996) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit. Some reports have put the total number of police pursuits nationwide at 250,000 a year. Landry,

[2] This figure is probably low, since not all police agencies within the State of California necessarily provided the required vehicular pursuit data to the California Highway Patrol for purposes of compiling this survey.

Letitia E., "Critics Sound Alarm Over Police Chases," *The Sacramento Bee*, July 6, 1995, p. A12.

It is critical to note that these numbers simply reflect the number of pursuits that were actually initiated. Quite obviously, there will be a significant number of occasions in which a police officer has made a decision not to pursue a fleeing suspect, a decision plainly impacted by the rules governing liability for initiating and conducting pursuits.

Not surprisingly, the increasing number of police pursuits has correspondingly spawned an explosion of related lawsuits in the federal court. Numerous cases arise from injuries to individuals who were the subjects of police pursuits.[3] Other cases involve claims by third

[3] See *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986) [no due process claim for fleeing suspect because no seizure occurred and action by police in pursuing neither indifferent nor arbitrary]; *Estate of Story v. McDuffie County*, 929 F. Supp. 1523 (S.D. Ga. 1996) [no due process claim for motorist who lost control of car during pursuit because mere pursuit without intentional application of force does not rise to level of constitutional right]; *Carrol v. Borough of State College*, 854 F. Supp. 1184 (M.D. Pa. 1994), aff'd, 47 F.3d 1160 (3d Cir. 1996) [no due process claim for motorcyclist injured after pursuit by police because action of pursuing does not shock the conscience]; *Medeiros v. Town of South Kingstown*, 821 F. Supp. 823 (D. R.I. 1993) [passenger in pursued vehicle could not assert due process claim against pursuing officers under "reckless indifference" standard]; *Frye v. Town of Akron*, 759 F. Supp. 1320 (N.D. Ind. 1991) [estate of motorcycle passenger injured after being pursued by police officers may assert due process claim under "reckless indifference" standard]; *Montgomery v. County of Clinton*, 743 F. Supp. 1253, 1255-1257 (W.D. Mich. 1990), aff'd, 940 F.2d 661 (6th Cir. 1991) [mother of motorist killed after being

parties who were injured either by the pursuing officers or by a suspect during a vehicular pursuit.[4] As numerous

---

pursued by police could not assert constitutional claim under Due Process Clause because Fourth Amendment governs police conduct in pursuit]; *Easterling v. City of Glennville*, 694 F. Supp. 911 (S.D. Ga. 1986) [estate of driver killed in pursuit can assert due process claim].

[4] See *Evans v. Avery*, 100 F.3d at 1038-1039 [due process claim by pedestrian struck by pursued vehicle subject to "shocks the conscience" standard]; *Fagan v. City of Vineland*, 22 F.3d at 1306 [due process claim by estate of individual killed by collision with pursued vehicle subject to "shocks the conscience" standard]; *Temkin v. Frederick County Commissioners*, 945 F.2d at 723 [same]; *Webber v. Mefford*, 43 F.3d 1340, 1342 (10th Cir. 1994) ["reckless indifference" standard applies to police pursuits]; *Roach v. City of Frederickstown*, 882 F.2d 294, 297 (8th Cir. 1989) [shocks the conscience standard applies to due process claim]; *Jones v. Sherril*, 827 F.2d 1102 (6th Cir. 1987) [no due process claim arises from injuries sustained by reason of police pursuit because action by police neither arbitrary nor indifferent under Due Process Clause]; *Magdziak v. Byrd*, 96 F.3d at 1047 [due process claim by third party injured by police car during vehicular pursuit of suspect is barred because officer is entitled to qualified immunity since law was not clearly established]; *Corbin v. City of Springfield*, 942 F. Supp. 721 [same]; *Smith v. Lexington Fayette Urban County Government, et al.*, 884 F. Supp. 1086 (E.D. Ky. 1995) [pedestrian may assert due process claim under "shocks the conscience" standard for injuries received when struck by a vehicle that was hit by a drunk driver being pursued by police officers]; *Jones v. Chieffo*, 833 F. Supp. 498 (E.D. Pa. 1993), aff'd, 22 F.3d 301 (3d Cir. 1994) [motorist injured by fleeing vehicle cannot establish due process violation under "reckless indifference" standard]; *Fulkerson v. City of Lancaster*, 801 F. Supp. 1476, 1481-1482 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993) [motorist injured by police officer who was pursuing suspect cannot establish due process claim under "reckless indifference" standard]; *Dismukes v. Hackathorn*, 802 F. Supp. 1442 (N.D. Miss. 1992) [summary judgment granted to

as these published decisions are, it is important to note that given the restrictive standards for publication, they likely represent only a fraction of the actual number of cases arising from police pursuits.

Moreover, vehicular pursuits are important not simply because of their sheer numbers, but because of their key function in allowing police officers to enforce the law and protect public safety. Vehicular pursuits are an integral tool in apprehending the most serious criminals – those who have committed felonies or who present a risk of danger to the public. For example, in California in 1994, 55% of all pursuits were *initiated* as the result of a traffic infraction, but 73% of those apprehended in pursuits were charged with felony violations. And, of that number, two-thirds of the felonies were for a charge other than evading a police officer. Only 1% of those apprehended in such pursuits were ultimately charged with only an infraction. *Evaluation of Risk*, p. 1. This underscores what would seem obvious – that those individuals who have committed the most serious crimes are most likely not to yield to lawful authority and to engage in reckless conduct threatening the public at large in an effort to evade apprehension.

---

officers in action by third party injured in collision in pursuit of vehicle because no Fourth Amendment violation]; *Hicks v. Leake*, 821 F. Supp. 419 (W.D. Va. 1992) [third party injured by police car fails to establish due process claim under "shocks the conscience" standard]; *Britt v. Little Rock Police Department*, 721 F. Supp. 189 (E.D. Ark. 1989) [estate of person injured by police vehicle pursuing suspect cannot assert due process claim based on gross negligence].

Rules of liability which directly impact and, as the Ninth Circuit's decision in *Lewis* does, limit a police officer's ability to initiate and conduct such pursuits has and will continue to have a direct impact on the ability of police officers to bring the most serious criminals to justice. These liability issues can also, depending upon how they are resolved, have a further impact on the public safety. They essentially invite suspects to flee in the most dangerous manner possible in hopes that a police officer, fearful of potential liability, will abandon the pursuit lest he be found "deliberately indifferent" in attempting to apprehend an individual who, before his eyes, is endangering the public.

There is presently no area of routine police practice that is more in need of clearly defined rules of liability than vehicular pursuits. It is therefore essential that this Court grant certiorari to resolve the conflict among the federal appellate courts concerning the standards of liability applied under the Due Process Clause and the scope of qualified immunity for such conduct by police officers.

II.

CERTIORARI IS WARRANTED TO ADDRESS THE THRESHOLD ISSUE OF WHETHER THE LIABILITY OF POLICE OFFICERS STEMMING FROM POLICE PURSUITS FALLS WITHIN THE AMORPHOUS PROVISIONS OF THE FOURTEENTH AMENDMENT, OR WHETHER CONSTITUTIONAL CLAIMS ARE CONFINED TO THE EXPLICIT TEXTUAL LIMITATIONS OF THE FOURTH AMENDMENT.

As previously noted, in *Albright v. Oliver*, 114 S. Ct. 807, the plaintiff had asserted a malicious prosecution claim premised upon violation of the Fourteenth Amendment. At the time, the circuit courts recognizing a malicious prosecution claim, generally did so in the context of the Due Process Clause. See *Albright*, 114 S. Ct. at 811 n.4. A plurality of this Court, however, concluded that to the extent the Constitution might give rise to some sort of claim for malicious prosecution, a plaintiff's right rested within the more specific provisions of the Fourth Amendment, and not the Fourteenth Amendment.

Amici curiae submit that the lower federal courts are jumping to a similar conclusion with respect to liability for injuries arising from police pursuits that do not result in a seizure under *Brower v. County of Inyo*. While virtually all published decisions assume the existence of a substantive due process claim, amici submit that this Court's decisions in *Graham*, *Albright* and *Brower* make it clear that the full extent of liability to be imposed for police pursuits is defined by the Fourth Amendment, and that police conduct falling outside those standards is squarely within the province of state tort law.

In *Graham* the Court expressed an intent to halt the use of amorphous substantive due process standards as a means of creating constitutional rights which were not fairly traceable to the Fourth Amendment. 490 U.S. at 393-95. The court held that "*all* claims that law enforcement officers have used *excessive force* – deadly or not – in the *course* of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . rather than under a 'substantive due process' approach." 490 U.S. at 395 (emphasis added). In a concurring opinion Justices Blackmun, Brennan, and Marshall recognized the breadth of the holding, and refused to "join in foreclosing the use of substantive due process analysis in prearrest cases." *Id.* at 400 (emphasis added).

Any doubt concerning *Graham*'s intent to foreclose the encroachment of the Due Process Clause on Fourth Amendment claims was removed in *Albright v. Oliver*, 114 S. Ct. 807, where the Court held that the Fourth Amendment is the exclusive source of constitutional protection in *post-arrest* prosecutions. In *Albright*, a warrant was issued for the petitioner's arrest based on a previously filed criminal information charging the petitioner with the sale of a substance that looked like, but was not, an illegal drug. 114 S. Ct. at 810. After petitioner voluntarily surrendered, the court found probable cause to bind petitioner over for trial, but later dismissed the criminal action because the charge did not state an offense under state law. *Id.* Petitioner alleged that under the Due Process Clause he had a protected " 'liberty interest' – to be free from criminal prosecution except upon probable cause." *Id.* at 810-11.

Applying the principles set forth in *Graham*, Chief Justice Rehnquist writing for the Court observed that a claim of criminal prosecution without probable cause is governed exclusively by the Fourth Amendment and not the " 'scarce and open-ended' " standards of substantive due process. *Albright*, 114 S. Ct. at 811, 812 (citation omitted). The Court rejected petitioner's claim that a substantive due process analysis applies to any "arbitrary" use of governmental power. *Id.* at 812. The proper inquiry in the area of criminal procedure is not merely whether the governmental action was "arbitrary" under the Due Process Clause but whether the action is arbitrary under the standards set forth in the specific provision of the Bill of Rights which govern a particular setting. *Id.* at 812-813 ("it was through [the] provisions of the [first 10 Amendments] of the Bill of Rights that [the] Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations").

The Court's decisions and reasoning in *Graham* and *Albright* repudiate the decisions of the Ninth Circuit and other federal appellate courts allowing pursuit claims to be brought under the Due Process Clause in those circumstances where an injury does not result from the intentional application of force by a police officer. The federal courts' fragmentation of the arrest setting for purposes of applying amorphous due process standards to some portion of it is inconsistent with the Court's recognition in *Graham* that conduct leading up to an actual arrest may fall short of the actual use of physical force, and yet still be governed exclusively by a Fourth Amendment analysis. *Graham*, 490 U.S. at 396 ("Fourth Amendment jurisprudence has long recognized that the

right to make an arrest" entails "the right to use some degree of physical coercion or *threat thereof* to effect it"). It is also inconsistent with *Albright*'s determination that the entire arrest setting, including post-arrest proceedings, is governed exclusively by the Fourth Amendment.

While the federal appellate courts have not yet recognized the sharp limitations *Graham* placed on encroachment of due process claims on the Fourth Amendment in the context of police pursuits, several district courts have applied *Graham* in foreclosing end runs around the strict terms of the Fourth Amendment. See *Estate of Story v. McDuffie County*, 929 F. Supp. at 1528 [due process claim by motorist who lost control of car when pursued by officers barred, because mere pursuit, without intentional application of force did not rise to the level of a constitutional violation: "The Constitution does not create and the Supreme Court and the Eleventh Circuit have never found a right which prohibits the use of high speed in an attempt to apprehend suspects who have resisted arrest by illegally fleeing in an automobile"]; *Dismukes v. Hackathorn*, 802 F. Supp. at 1449 [third party injured in a collision with a vehicle being pursued by police officers cannot assert claim because no seizure occurred under the Fourth Amendment]; *Montgomery v. County of Clinton*, 743 F. Supp. at 1256-1257 [mother of a motorist killed after being pursued by police could not assert a constitutional claim, since the Fourth Amendment provided an explicit textual source for evaluating police conduct, and there was no seizure by police].

The failure of the majority of the federal courts to follow *Graham* in the pursuit setting is in part attributable to the erroneous assumption that there must always be a

constitutional remedy for "arbitrary" police conduct. *Paul v. Davis*, 424 U.S. 693, 698-700 (1976), *reh'g denied*, 425 U.S. 985 (1976) (the Due Process Clause does not provide a *constitutional* remedy for every legally cognizable injury under state law which a state official may inflict). As Justice Souter observed in *Albright*, even if substantive due process rights can be inferred in order to protect against " 'substantial arbitrary impositions and purposeless restraints,' " it is only where protection under the Due Process Clause would add a "substantial increment of protection" that is not otherwise available under the specific provisions of the Bill of Rights. 114 S. Ct. at 820 (Souter, J., concurring). Justice Souter justified this restriction on pragmatic grounds, namely, to avoid imposing the burden on trial courts "of reconciling well-established jurisprudence under the Fourth Amendment . . . with the ill-defined contours of some novel due process right." *Ibid.*

Justice Souter's reasoning underscores the impropriety of the approach taken by the lower federal courts with respect to police pursuits. A "substantial" increment of protection over that provided by the Fourth Amendment will *not* be added by fragmenting the arrest setting. Reckless or wanton conduct is that which "is so far removed from a proper state of mind that it is treated in many respects as if it were so intended." W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 34, at 213 (5th ed. 1984); *see also Brower*, 489 U.S. at 596 ("the word 'seizure' . . . can hardly be applied to an unknowing act"). It follows that under *Brower*, a "wilful" seizure can be inferred where physical injury results from conduct that

is sufficiently egregious to lead a reasonable officer to know a suspect is highly likely to be injured.

Further, the burden on trial courts attempting to reconcile well-established Fourth Amendment jurisprudence with the ill-defined contours of a "novel" due process right is particularly evident in this area as illustrated by the widely varying opinions of the Ninth, First, Third and Fourth Circuits in attempting to determine precisely which, if any, "due process" standard should be applied.

There is simply no need to create an amorphous constitutional standard under the Due Process Clause in order to provide redress for perceived police misconduct in initiating and conducting a pursuit. California, like other states, has created a rigorous statutory scheme covering liability of police officers and public entities for injuries resulting from the initiation, conduct and termination of police pursuits.[5] These state statutes strike a

---

[5] California Vehicle Code section 17004 immunizes public employees from liability for injuries caused by emergency pursuits in authorized vehicles in the line of duty. Section 17004.7 immunizes a public entity from liability in such cases if the law enforcement agency in question has adopted a written pursuit policy containing specific criteria to be used by officers in determining whether to initiate, continue or terminate a pursuit, provides for supervisory control of the pursuit, coordination with other jurisdictions and procedures for establishing the number and priority of pursuit vehicles. See *Billester v. City of Corona*, 26 Cal. App. 4th 1107, 32 Cal. Rptr. 2d 121 (1994) [public entity entitled to immunity; pursuit policy adequate]; *Brumer v. City of Los Angeles*, 24 Cal. App. 4th 983, 29 Cal. Rptr. 2d 515 (1994) [same]; *Berman v. City of Daly City*, 21 Cal. App. 4th 276, 26 Cal. Rptr. 2d 493 (1993) [no immunity; pursuit policy lacks specific criteria for initiating and terminating pursuit]; *Payne v. City of Perris*, 12 Cal. App. 4th 1738, 16 Cal. Rptr. 2d 143 (1993) [same]; *Colvin v. City of Gardena*, 11 Cal. App. 4th 1270, 15 Cal. Rptr. 2d 234 (1992) [no immunity; policy lacks procedure for determining number and priority of pursuing vehicles].

balance between the clear need of police officers to engage in pursuits without fear of entanglement in litigation, yet at the same time require that consideration be given to the hazard posed not simply to suspects, but to the public at large. It is difficult to see what additional modicum of protection the creation of a due process claim out of whole cloth provides over and above state law.

In addition, the existence of more generous and indeed conflicting standards of liability governing these amorphous constitutional claims necessarily means that litigants will elect to proceed on federal claims in federal court instead of confining themselves to state tort remedies in state courts. In an era in which the federal courts are already overburdened, the utility in creating another constitutional cause of action would seem to be marginal at best, especially in light a more than adequate state tort law scheme to address the same conduct.

As indicated by *Lewis* and the decisions of the other federal appellate courts, the Due Process Clause is again being expanded to encompass claims that for constitutional and policy reasons are best left to state law. It is therefore essential that this Court grant certiorari in this case in order to address the important threshold question of whether the Fourteenth Amendment provides any remedy for such conduct by police officers.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the petition for writ of certiorari should be granted.

Dated: March 20, 1997.

Respectfully submitted,

WILLIAM C. KATZENSTEIN
County Counsel
County of Riverside

JOHN J. SANSONE
County Counsel
County of San Diego
DIANE BARDSLEY
Chief Deputy

JAMES K. HAHN
City Attorney
City of Los Angeles
G. DANIEL WOODARD
Senior Assistant City Attorney
GREGORY P. ORLAND
Deputy City Attorney

GREINES, MARTIN, STEIN & RICHLAND LLP
TIMOTHY T. COATES

Attorneys for Amici Curiae County of Riverside, County of San Diego and City of Los Angeles

(4)

FILED

No. 961337 MAR 21 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

Petitioners,

v.

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of PHILIP LEWIS,

Respondents.

On Petition For Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

[redacted]

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALASKA, ARIZONA, TERRITORY OF GUAM, HAWAII, IDAHO, IOWA, MONTANA, NEW YORK, NORTH DAKOTA, OHIO, OREGON, SOUTH DAKOTA, WISCONSIN AND WYOMING IN SUPPORT OF THE PETITION FOR CERTIORARI

DANIEL E. LUNGREN,
Attorney General of the
State of California
MARGARET A. RODDA,
Senior Assistant Attorney General
ERIC SAWYER,*
Deputy Attorney General
Counsel of Record for Amici States
300 S. Spring Street, 5th Floor
Los Angeles, CA 90013
Telephone: (213) 897-2149

Additional Counsel Listed Inside
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

ADDITIONAL COUNSEL

State of Alaska
BRUCE M. BOTELHO
Attorney General
Office of the Attorney General
P.O. Box 110300
Diamond Courthouse
Juneau, AK 99811-0300

State of Arizona
GRANT WOODS
Attorney General
1275 West Washington
Phoenix, AZ 95007-2926

State of Idaho
ALAN G. LANCE
Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Territory of Guam
CALVIN E. HOLLOWAY, SR.
Attorney General
2-200 E. Judicial Center Building
120 West O'Brien Drive
Agana, Guam 96910

State of Iowa
TOM MILLER
Attorney General
Office of the Attorney General
Hoover State Office Building
Des Moines, IA 50319

State of South Dakota
MARK BARNETT
Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070

State of Hawaii
MARGERY S. BRONSTER
Attorney General
425 Queen Street
Honolulu, HI 96813

State of Montana
JOSEPH P. MAZUREK
Attorney General
Office of the Attorney General
Justice Building
215 North Sanders
Helena, MT 59620-1401

State of New York
DENNIS C. VACCO
Attorney General
The Capitol
Albany, NY 12224

State of North Dakota
HEIDI HEITKAMP
Attorney General
600 E. Boulevard
Bismarck, ND 58505-0040

State of Ohio
BETTY D. MONTGOMERY
Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215

State of Oregon
HARDY MYERS
Attorney General
100 Justice Building
Salem, OR 97310

State of Wisconsin
JAMES E. DOYLE
Attorney General
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

State of Wyoming
WILLIAM U. HILL
Attorney General
Office of the Attorney General
State Capitol Building
Cheyenne, WY 82002

MOTION OF STATES FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, the States of California, Alaska, Arizona, Territory of Guam, Hawaii, Idaho, Iowa, Montana, New York, North Dakota, Ohio, South Dakota and Wyoming hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for petitioner has been obtained. The consent of the attorneys for respondent was requested but refused or withheld.

The interest of the *Amici* arises from their responsibility for law enforcement in general and for their particular responsibility for ensuring the safety of the highways. *Amici* respectfully suggest that it will be useful to the Court to consider their views which focus on the particular concern for patrolling state highways.

Respectfully submitted,

ERIC SAWYER,
Deputy Attorney General
(Counsel of Record)
State of California
Department of Justice
Office of the Attorney General
300 S. Spring Street, 5th Floor
Los Angeles, CA 90013
Telephone: (213) 897-2149

State of Alaska
BRUCE M. BOTELHO
Attorney General
Office of the Attorney General
P.O. Box 110300
Diamond Courthouse
Juneau, AK 99811-0300
(907) 465-2133

State of Arizona
GRANT WOODS
Attorney General
1275 West Washington
Phoenix, AZ 95007-2926
(602) 542-4266

QUESTIONS PRESENTED

I. Is the standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment in a police vehicular pursuit case brought pursuant to 42 U.S.C § 1983, conduct that "shocks the conscience" or is it conduct "deliberately indifferent" to or "in reckless disregard" of the rights of a person injured in the course of the pursuit?

II. Is the law governing police pursuit cases "clearly established" so that officers engaged in such pursuits must be denied the protection of qualified good faith immunity from liability to a person injured in the course of the pursuit?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTEREST OF AMICI STATES	1
SUMMARY OF ARGUMENT	3
REASONS WHY CERTIORARI SHOULD BE GRANTED	4
I. REVIEW IS NECESSARY BECAUSE THE OPINION OF THE NINTH CIRCUIT IS INCONSISTENT WITH THE OPINION OF THIS COURT AND THOSE OF THE FIRST, THIRD, FOURTH AND FIFTH CIRCUITS CONCERNING THE STANDARD OF CONDUCT NECESSARY TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS IN THE CONTEXT OF A VEHICULAR POLICE PURSUIT	4
II. REVIEW IS WARRANTED TO INSURE THAT PEACE OFFICERS ARE PROTECTED FROM LIABILITY BY THE DOCTRINE OF QUALIFIED IMMUNITY WHEN THE STANDARD GOVERNING THEIR CONDUCT IS NOT CLEARLY ESTABLISHED	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Anderson v. Creighton, 483 U.S. 635 (1987)	12
Baker v. McCollan, 443 U.S. 137 (1979)	10
Checki v. Webb, 785 F.2d 534 (5th Cir. 1986)	6
City of Canton v. Harris, 489 U.S. 378 (1989)	6
Collins v. City of Harker Heights, 503 U.S. 115 (1992)	1, 4, 6, 9
Davis v. Scherer, 468 U.S. 183 (1984)	11, 12
Donovan v. City of Milwaukee, 17 F.3d 944 (7th Cir. 1994)	12
Elder v. Holloway, 510 U.S. 510 (1994)	11
Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996)	6, 13
Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994)	6, 8, 13
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	11
Hunter v. Bryant, 503 U.S. 224 (1991)	12
Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987)	7
Lassiter v. Alabama A & M University, Bd. of Trustees, 28 F.3d 1146 (11th Cir. 1994)	12
Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1996)	*passim*
L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992)	8
Malley v. Briggs, 475 U.S. 335 (1986)	13
Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992)	7, 13

TABLE OF AUTHORITIES – Continued

Page

Paul v. Davis, 424 U.S. 693 (1976) 10

Post v. City of Fort Lauderdale, 7 F.3d 1552 (11th Cir. 1993) 12

Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) 10

Roach v. City of Fredericktown, 882 F.2d 294 (8th Cir. 1989) 13

Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) ..6, 13

Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995) 8, 9

STATUTES

42 United States Code § 1983 (Civil Rights Act).....1, 3, 4, 11

BRIEF OF AMICUS CURIAE

INTEREST OF AMICI STATES

Amici States are responsible for patrolling the highways of this Nation and enforcing the laws that pertain to motorists and the safe, lawful operation of motor vehicles. The States also have a general interest in crime prevention, effective law enforcement, and public safety. If allowed to stand, the decision of the Ninth Circuit Court of Appeals in the underlying case of *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), will cripple apprehension of those who violate the law and will have an extremely negative impact on law enforcement.

In *Lewis*, the Ninth Circuit applied "deliberate indifference" or "reckless disregard" as the standard of conduct necessary to establish a violation of the substantive due process rights of a person injured as a result of a police vehicular pursuit. The Court further held that the defendant police officer was not entitled to the protection of qualified immunity from liability because the law governing police pursuit cases was "clearly established" at the time of the 1990 incident giving rise to the action.

The standard adopted by the Ninth Circuit is clearly contrary to the ruling of this Court in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) that conduct which gives rise to liability under the Civil Rights Act, 42 U.S.C. § 1983 must be conduct which "shocks the conscience." Moreover the conclusion of the Court that the officer was not entitled to good faith immunity because the law governing his conduct was "well established" is contrary to years of precedent and stands the concept of "well established" on its head.

The Amici States clearly have an interest in having this Court grant the petition of the County and reverse the Ninth Circuit. If this Court fails to assume jurisdiction and the *Lewis* decision stands, law enforcement entities will be forced to decide whether or not they can *afford* to continue to engage in high speed vehicular pursuits. If *Lewis* stands, every pursuit which results in any injury, regardless of the circumstances, will lead to the filing of a civil rights action, exposing the entity to the cost of defending the action. Trial courts will refuse to grant summary judgment in all but the rarest of cases; they will be precluded from dismissing cases on grounds of qualified immunity. Law enforcement entities will have to choose between settling the action and facing the risk of an award of general damages, special damages, costs *and* attorneys fees as well as the risk of an award of punitive damages against their employee officers. In short, entities and the public can expect a very substantial increase in the cost of doing business. State highway patrols may have to abandon high speed pursuits in all but the most compelling of circumstances. As it becomes public knowledge that high speed pursuits are very narrowly proscribed, drunk drivers, serious felons, and those who simply want to avoid the high cost of a speeding ticket, will flee leaving police officers without effective means of enforcing the law.

Amici States have an acute interest in effective law enforcement and therefore a significant interest in this case. This interest can only be protected by granting the requested petition for certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit erred in concluding that an officer engaged in a high speed vehicular pursuit can be held liable under the Civil Rights Act, 42 U.S.C. § 1983 if that officer's conduct was "deliberately indifferent to or in reckless disregard of" the substantive due process rights of a person injured as a result of the pursuit. This Court has established that an additional element is required; the conduct must be conduct which "shocks the conscience." The standard adopted by the Ninth Circuit is inconsistent with the precedent set by this Court and with the decisions of the majority of the circuits which have addressed the issue.

The public policy impact of adopting the standard proposed by the Ninth Circuit is obvious. The standard of "deliberate indifference to or reckless disregard of" the safety of an injured person will essentially federalize state tort claims and open the proverbial floodgates of litigation, effects this Court has taken great pains to avoid.

The Ninth Circuit also erred in concluding that qualified immunity does not protect the individual officer from liability in cases such as *Lewis*. The law governing vehicular pursuits was not, and currently is not, clearly established. This is evidenced by the manifest disagreement among the various circuits concerning the standard of conduct which will give rise to liability. A police officer is entitled to the protection of qualified immunity while the standard which governs his conduct is uncertain. The Ninth Circuit erred in denying immunity.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

REVIEW IS NECESSARY BECAUSE THE OPINION OF THE NINTH CIRCUIT IS INCONSISTENT WITH THE OPINION OF THIS COURT AND THOSE OF THE FIRST, THIRD, FOURTH AND FIFTH CIRCUITS CONCERNING THE STANDARD OF CONDUCT NECESSARY TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS IN THE CONTEXT OF A VEHICULAR POLICE PURSUIT.

The Ninth Circuit erred in concluding that in the context of a high speed vehicular police pursuit case that "deliberate indifference to or reckless disregard" of the rights of an injured party is sufficient to establish liability under Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983. Its decision is inconsistent with the decision of this Court in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) and with the majority of circuits which have addressed the issue. To establish liability in this context, the actions of the police officer must constitute conduct which "shocks the conscience."

In 1992, this Court reviewed the issue of substantive due process in the landmark case of *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). In *Collins*, the wife of a city sanitation worker asphyxiated during the course of his duties claimed that her husband's substantive due process rights were violated by the city's alleged custom and policy of deliberate indifference to the safety of its employees. After noting its concern with any expansion of the concept of substantive due process, this Court added as a necessary element to plaintiff's claim, the

requirement that the "deliberate indifference of the City to Collins' safety be arbitrary government action that 'shock[s] the conscience' of federal judges." *Id.*, at 126. The Court reiterated this requirement when it ultimately concluded that the conduct of the city did not violate substantive due process because the city's conduct could not be characterized as conscience shocking. *Id.*, at 128. The Court viewed plaintiff's claim as a typical state tort claim. It reiterated its well established rejection of the notion that the Due Process Clause should be interpreted to create federal duties of care analogous to tort law. *Id.*

The *Lewis* case involves a vehicular pursuit by Sacramento County Sheriff Officer Smith of two teenagers on a motorcycle who refused to stop at the request of another officer, accelerated away at a high rate of speed, and ran a stop light. According to the Ninth Circuit, the speed of the chase averaged 60 m.p.h. and proceeded through four stop lights. When the motorcycle driver went over the crest of a hill and then attempted to negotiate a sharp turn, he lost control of the motorcycle skidding to a stop. Officer Smith crested the hill, lost control of his vehicle and was unable to stop. Neither of the teenagers was wearing a helmet. The motorcycle passenger died as a result of his injuries. His parents sued for violations of his civil rights.

After conceding that its prior decisions holding that gross negligence is the standard of conduct necessary to establish a substantive due process violation were no longer controlling, the Ninth Circuit stated that it was, however, "clear that deliberate indifference is always sufficient." *Lewis*, 98 F.3d at 440. The Court concluded that "the appropriate degree of fault to be applied to high-

speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security." *Lewis*, 98 F.3d at 441.

For reasons which are unclear, the Ninth Circuit totally ignored the *Collins* decision in deciding *Lewis*. The Court cited *Collins* only once and then only for the principle that the Due Process Clause does not supplant traditional tort law. *Lewis*, 98 F.3d at 439. The court never addressed the issue of the additional element enunciated in the *Collins* case that the governmental misconduct be conduct which "shocks the conscience." Instead, the Court discussed *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), as though *Canton* were the most recent pronouncement of this Court on the standard of conduct necessary to constitute a violation of substantive due process. It did not discuss, distinguish, or criticize *Collins*; *Collins* was simply ignored.

Since *Collins*, the First and Third Circuits have addressed the issue of the standard of conduct in police pursuit cases and have correctly interpreted *Collins* to require a showing of conduct which "shocks the conscience" as a prerequisite to stating a claim for violation of substantive due process. See *Evans v. Avery*, 100 F.3d 1033, 1038-39 (1st Cir. 1996) and *Fagan v. City of Vineland*, 22 F.3d 1296, 1306-1307 (3d Cir. 1994) (en banc).

Two other circuits, the Fourth and Fifth, applied the conscience shocking standard to police pursuits prior to the issuance of *Collins*. See *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 723 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) and *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986).

However there are several other police pursuit cases in which the courts have adopted a lesser or different standard. In *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987), the Eighth Circuit held that gross negligence or outrageous conduct would suffice. In the high speed case of *Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992), the Tenth Circuit adopted a standard of reckless disregard of plaintiff's rights.

Amici States submit that the "shocks the conscience" standard is the standard dictated by this Court, and that it controls this case. In its discussion of various decisions addressing the question of standard of conduct the Ninth Circuit referred to the different standards as mere labels. The court states as follows:

> "Five circuits have addressed § 1983 liability in the context of high-speed pursuits. These circuits have applied *various labels* to the standard of conduct that may lead to liability." *Lewis v. County of Sacramento*, at 439. (Italics added.)
>
> "Footnote 5. No federal circuit court has required intentional government misconduct as a basis for a § 1983 due process violation. Likewise, no circuit has found that negligent conduct can form the basis of a § 1983 due process violation. But the *labels* the courts have applied to official conduct constituting a § 1983 due process violation range across a spectrum that lies between ordinary negligence and intentional misconduct." *Lewis, Id.* (Italics added)

The Ninth Circuit then proceeded to cite the cases applying different standards as though the standards were merely different labels for the same concept.

If the issue were merely one of labels as the Ninth Circuit suggests, one would expect the same result in cases involving very similar conduct. This is not the case. In cases in which the "shocks the conscience" standard was applied, the courts found no due process violation; in cases in which the courts applied the "deliberate indifference" or "reckless disregard" standard, a claim was found to exist.

For instance, the facts in the *Lewis* case and the *Fagan* case are quite similar. Both cases involved pursuit of teenagers. Both pursuits were initiated for relatively minor transgressions. Both pursuits reached speeds in excess of 60 miles per hour. In *Lewis*, the Ninth Circuit concluded that a standard of deliberate indifference or reckless disregard applied and that therefore an issue of fact existed and summary judgment should not have been granted by the trial court. *Lewis v. Sacramento County*, 98 F.3d at 444.

By contrast, in *Fagan*, the Third Circuit applied the "shocks the conscience" standard and concluded that a genuine issue of fact was not present and summary judgment was appropriate. *Fagan v. City of Vineland*, 22 F.3d at 1308-1309.

Another example in a context other than the police pursuit scenario is presented by a comparison of *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) and *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995). In *Grubbs*, a nurse employed by the State of Oregon at a medium security institution for young male offenders was raped and terrorized by one of the inmates. In her action against the State, she alleged that the government actors had violated her

rights by intentionally placing her in a position of known danger, that is, in unguarded proximity to a violent sex offender. The Ninth Circuit concluded that the plaintiff had stated facts demonstrating official deliberate indifference to her safety and that she had therefore stated a claim for violation of her substantive due process rights.

The facts in the case of *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995) are quite similar. *Uhlrig* involved a claim by the estate of an activity specialist employed at a state mental hospital, that the substantive due process rights of the therapist were violated when she was murdered by a violent patient. The State had eliminated a special unit for the criminally insane and as a result the patient was placed in the general population. Prior to murdering the therapist, he had raped and assaulted another patient. The Tenth Circuit explained that under *Collins*, plaintiff must make a showing of government conduct which shocks the conscience. The Court found none and affirmed summary judgment in favor of the hospital defendants. *Uhlrig v. Harder*, 64 F.3d at 573-576.

Clearly the standards applied by the courts reflect more than mere differences in labeling. The standard applied dictates the outcome.

Amici States submit that not only is the "shocks the conscience" standard the rule of this Court, but it is the better rule because it strikes the appropriate balance between competing concerns. The standard is sufficient to protect individuals from government abuse and yet allow peace officers to pursue those who violate the law.

The standard followed by the Ninth Circuit cripples law enforcement by turning unintentional conduct into

civil rights violations. This Court has taken great pains to avoid such result and has repeatedly cautioned against making the Fourteenth Amendment a font of tort law. *Paul v. Davis*, 424 U.S. 693, 701 (1976). The reluctance of this Court to expand the scope of substantive due process of the Fourteenth Amendment is that guideposts for responsible decision making in this unchartered area are scarce and open-ended. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985). Thus, the Court has followed a policy of judicial self-restraint and exercised the utmost care when requested to break new ground in this area. *Id.* To this end, the Court has previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. *Baker v. McCollan*, 443 U.S. 137, 146 (1979). The decision of the Ninth Circuit in *Lewis* does precisely that and should not be permitted to stand.

The confusion generated by the decision of the Ninth Circuit in the case at bar must be eliminated. Amici States respectfully request that the petition be granted.

II.

REVIEW IS WARRANTED TO INSURE THAT PEACE OFFICERS ARE PROTECTED FROM LIABILITY BY THE DOCTRINE OF QUALIFIED IMMUNITY WHEN THE STANDARD GOVERNING THEIR CONDUCT IS NOT CLEARLY ESTABLISHED.

For purposes of qualified immunity under 42 U.S.C. § 1983, the threshold question is whether the conduct complained of violated law clearly established at the time of the incident. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Review of this issue must be conducted in light of all relevant precedent. *Elder v. Holloway*, 510 U.S. 510 (1994).

As articulated by this Court in *Davis v. Scherer*, 468 U.S. 183 (1984), the necessity for the "clear establishment" of the law is of vital importance for protecting public officials, in that:

> "[t]he qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated . . . "
>
> "Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them . . . In these circumstances, officials should not err always on the side of caution.

Id., at 195-196."

In order for a law to be clearly established for purposes of qualified immunity, it must have earlier been developed in such a concrete and factually defined context to make it obvious to any reasonable government actor that what he is doing violates federal law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The various circuits have provided additional guidance as to when law is "clearly established." For example, if case law in factual terms has not staked out a bright line, qualified immunity almost always protects the defendant. *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

The pre-existing law must not only dictate, but truly compel – not merely suggest or allow or raise a question about – the conclusion for every like-situated government agent. *Lassiter v. Alabama A & M University, Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994). Another court has noted that where only two other circuits had considered cases on point, and a split existed between them, the relevant case law was still developing and the law had not been "clearly established." *Donovan v. City of Milwaukee*, 17 F.3d 944 (7th Cir. 1994).

Even if a governmental defendant violates another's constitutional rights, the qualified immunity protects the defendant so long as the conduct of the defendant was not unreasonable. *Davis v. Scherer*, 468 U.S. 183, 190 (1984). The test for reasonable conduct is whether the officer involved would have believed the action in question to be lawful, in light of clearly established law and the information possessed by the officer. *Hunter v. Bryant*, 503 U.S. 224, 227 (1991). In sum, the qualified immunity

defense provides protection to all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335 (1986).

The Ninth Circuit erred in finding the law on high speed pursuits is clearly established. The various circuit courts of appeal are clearly divided on the issue of the legal standard necessary to violate the substantive due process. The First [*Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996)], Third [*Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994)], and Fourth [*Temkin v. Frederick County Comm'rs*, 945 F.2d 716 (4th Cir.1991)] have held the standard to be conduct which "shocks the conscience." While the Tenth [*Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992)] and Eighth [*Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989)] have adopted lesser standards such as "deliberate indifference" or "gross negligence."

This conflict clearly indicates that the law is still developing. These cases do not serve as a bright-line to police officers patrolling the highways, nor can it be said that the law is so concrete that any reasonable officer would understand that pursuing a fleeing suspect at high speeds will violate the motoring public's civil rights. Likewise it cannot be said that the state of the law is such that the law "compels" the same conclusion for all like-situated reasonable officers.

Amici States respectfully submit that a peace officer should be immune from liability under the Civil Rights Act for injuries which occur in the course of a high speed chase until the courts have agreed on the standard of conduct, have established the factors which should be

considered in evaluating the conduct of the officer, and have provided some guidance as to the factual scenarios giving rise to liability.

Amici States request that this Court grant the petition for certiorari and reverse the Ninth Circuit's holding that qualified immunity does not protect peace officers engaged in high speed pursuits and that the Court take the opportunity to provide the lower courts with some guidance in application of the immunity in the context of these cases.

CONCLUSION

Based on the foregoing, Amici States respectfully request that the petition for writ of certiorari be granted.

DATED: March 20, 1997

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California

MARGARET A. RODDA,
Senior Assistant Attorney General

ERIC SAWYER*,
Deputy Attorney General

Counsel of Record for Amici States

300 S. Spring Street, 5th floor
Los Angeles, CA 90013
Telephone: (213) 897-2149

Supreme Court, U.S.
FILED
JUL 14 1997
CLERK

(6)

No. 96-1337

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

TERENCE J. CASSIDY*
MARCOS A. KROPF
PORTER, SCOTT, WEIBERG & DELEHANT
350 University Avenue, Suite 200
Sacramento, CA 95825
Telephone: (916) 929-1481
Attorneys for Petitioners
**Counsel of Record*

MICHAEL L. BAUM*
PAUL J. HEDLUND
BAUM, HEDLUND, ARISTEI, GUILFORD & DOWNEY
12100 Wilshire Boulevard, Suite 950
Los Angeles, CA 90025
Telephone: (310) 207-3233
Attorneys for Respondents
**Counsel of Record*

Petition For Certiorari Filed February 19, 1997
Certiorari Granted June 2, 1997

311 pp

TABLE OF CONTENTS

Page

Relevant docket entries from the United States District Court for the Eastern District of California 1

Relevant docket entries from the United States Court of Appeals for the Ninth Circuit 5

Plaintiff's Complaint and Jury Demand 9

Defendant's Motion for Total or Partial Summary Judgment 19

Defendant's Separate Statement of Undisputed Material Facts 174

Plaintiff's Memorandum and Opposition to Defendant's Motion for Summary Judgment..... 187

Plaintiff's Statement of Disputed and additional facts 274

Defendant's Reply Brief in Support of Motion for Total or Partial Summary Judgment..... 294

ADDITIONAL DOCUMENTS CONTAINED IN APPENDIX TO PETITION FOR WRIT OF CERTIORARI

U.S. District Court for the Eastern District of California's Order regarding Summary Judgment ..... Pet. App. 46

Ninth Circuit Court of Appeals Opinion ... Pet. App. 1

Ninth Circuit Court of Appeals Order re Petition for Rehearing and Suggestion for Rehearing en banc ..... Pet. App. 61

TERMED REFER

U.S. District Court
EASTERN DISTRICT OF CALIFORNIA (Sacramento)

CIVIL DOCKET FOR CASE #: 91-CV-505

Lewis, et al v. Filed: 04/24/91
Sacramento County, et al
Assigned to: Jury demand: Defendant
Judge Garland E Burrell
Referred to: Magistrate Judge Gregory G Hollows
Demand: $0,000 Nature of Suit: 440
Lead Docket: None Jurisdiction: Federal Question
Dkt # in Sac County Sup : is 519277

Cause: 42:1983 Civil Rights Act

TERI LEWIS, Personal Representative of Estate of Philip Lewis plaintiff	Michael Lin Baum 213-207-3233 [COR LD NTC] Coale Kanack and Murgatroyd 12100 Wilshire Boulevard Suite 650 Los Angeles, CA 90025 213-207-3233
THOMAS LEWIS, Personal representative of the Estate of Philip Lewis plaintiff	Michael Lin Baum (See above) [COR LD NTC]

v.

SACRAMENTO COUNTY defendant	Terence John Cassidy [COR LD NTC] Porter Scott Weiberg Delehant Post Office Box 255428 350 University Avenue Suite 200 Sacramento, CA 95865 916-929-1481
SACRAMENTO COUNTY SHERIFFS DEPARTMENT defendant	Terence John Cassidy (See above) [COR LD NTC] John Robert Thacker [LD NTC] Porter Scott Weiberg Delehant Post Office Box 255428 350 University Avenue Suite 200 Sacramento, CA 95865 916-929-1481
JAMES E SMITH defendant	Terence John Cassidy (See above) [COR LD NTC] John Robert Thacker (See above) [LD NTC]
STATE OF CALIFORNIA defendant [term 01/22/92]	DAG [term 01/22/92] [COR LD NTC] Attorney General's Office of the State of California PO Box 944255 1300 I Street Suite 125 Sacramento, CA 94244-2550 916-445-9555

SACRAMENTO COUNTY third-party plaintiff	Terence John Cassidy [COR LD NTC] Porter Scott Weiberg Delehant Post Office Box 255428 350 University Avenue Suite 200 Sacramento, CA 95865 916-929-1481
SACRAMENTO COUNTY SHERIFFS DEPARTMENT third-party plaintiff	Terence John Cassidy (See above) [COR LD NTC]
JAMES E SMITH third-party plaintiff	Terence John Cassidy (See above) [COR LD NTC]

BRIAN A WILLARD
third-party defendant

11/11/92	44	NOTICE OF MOTION AND MOTION by dfts Sacramento County, Sac Co Sheriffs Dept, James E Smith for summary judgment set for 12/7/92 at 9:00 before GEB: MEMORANDUM; DECLARATION of John Thacker in support; EXHIBITS (bw) [Entry date 11/12/92]
11/11/92	45	STATEMENT by dfts Sacramento County, Sac Co Sheriffs Dept, James E Smith of UNDISPUTED MATERIAL FACTS (bw) [Entry date 11/13/92]
2/8/93	56	SEPARATE STATEMENT by plaintiff's of disputed facts and additional facts (dav) [Entry date 02/09/93]

2/8/93	57	MEMORANDUM by plaintiff in opposition to motion for summary judgment set before GEB [44-1] (dav) [Entry date 02/09/93]
2/17/93	60	REPLY brief by dfts James E Smith, Sac Co Sheriffs Dept, Sacramento County in SUPPORT of motion for summary judgment [44-1] (bw) [Entry date 02/18/93]
4/12/93	63	ORDER by Judge Garland E Burrell ORDERING: dft's motion for summary judgment [44-1] GRANTED IN PART AND DENIED IN PART: 1) GRANTED as to pltf's federal and state causes of action against dft Officer Smith; 2) GRANTED as to pltf's section 1983 claim against County of Sacramento and Sacramento County Sheriff's Dept; and 3) DENIED as to pltf's state negligence claim against County of Sacramento and Sacramento County Sheriff's Dept; since the only claim which survives summary judgment is a pendent state law claim, the court excercises [sic] its discretion to DISMISS this claim w/o prejudice; pltfs may file their negligence claim in the state court; case DISMISSED (cc: all counsel) (bw)
4/12/93	64	JUDGMENT: by Judge Garland E Burrell entered according to the court's order filed 4/12/93 (cc: all counsel) (bw)
5/10/93	68	NOTICE OF APPEAL by pltfs Teri Lewis, Thomas Lewis from District Court decision [64-1] (fee status: paid) (appeal originally received by the 9th Circuit Court of Appeals on 5/3/93) (bw)

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 93-15924 Filed: 5/20/93
Nsuit: 3440 Other civil rights (Fed)
Lewis, et al v. Sacramento County, et al
Appeal from: Eastern District of California (Sacramento)

Case type information:
1) civil
2) private
3)

Lower court information:

District: 0972-2 : CV-91-00505-GEB (GGH)
court reporter: Russ Camp, Court Reporter
presiding judge: Garland E. Burrell, District Judge
Date Filed: 4/24/91
Date order/judgment: 4/12/93
Date NOA filed: 5/10/93

Fee status: paid

Prior cases:
None
Current cases:
None

TERI LEWIS, Personal Representatives of Estate of Philip Lewis Plaintiff - Appellant	Paul J. Hedlund, Esq. 310/207-207-3233 Suite 650 [COR LD NTC ret] 12100 Wilshire Blvd. Los Angeles, CA 90025 :
THOMAS LEWIS, Personal representative of the Estate of Philip Lewis Plaintiff - Appellant	Paul J. Hedlund, Esq. (See above) [COR LD NTC ret]
	v.
SACRAMENTO COUNTY Defendant - Appellee	Terence John Cassidy 916/929-1481 [COR LD NTC ret] PORTER, SCOTT, WEINBERG AND DELEHANT 350 University Avenue P.O. Box 255428 Sacramento, CA 95865
SACRAMENTO COUNTY SHERIFF'S DEPARTMENT Defendant - Appellee	Terence John Cassidy (See above) [COR LD NTC ret]
JAMES E. SMITH Defendant - Appellee	Terence John Cassidy (See above) [COR LD NTC ret]

TERI LEWIS, Personal Representatives of Estate of Philip Lewis; THOMAS LEWIS, Personal representative of the Estate of Philip Lewis

Plaintiffs - Appellants

v.

SACRAMENTO COUNTY; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT; JAMES E. SMITH

Defendants - Appellees

10/7/93	Filed original and 15 copies Appellant Thomas Lewis, Appellant Teri Lewis amended opening brief (Informal: n) 34 pages and five excerpts of record in 1 volumes; served on 10/5/93 [93-15924] (rei)
11/22/93	Filed original and 15 copies appellee James E. Smith, Sac. Cnty Sheriff, Sacramento County's 25 pages brief, 5 Exc. vols: ; served on 11/15/93 [93-15924] (rei)
11/29/93	Filed original and 15 copies Thomas Lewis, Teri Lewis reply brief, (Informal: n) 18 pages; served on 11/24/93 [93-15924] (rei)
10/7/94	ARGUED AND SUBMITTED TO Harry PREGERSON, Charles E. WIGGINS, Harold M. Fong [93-15924] (ah)
10/9/96	FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party to bear its own costs. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Mary M. SCHROEDER; Harry PREGERSON, author; Charles E. WIGGINS.) FILED AND ENTERED JUDGMENT. [93-15924] (sa)
10/24/96	Filed original and 40 copies Appellee James E. Smith, Appellee Sac. Cnty Sheriff, Appellee Sacramento County petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 10/23/96 (PANEL AND ALL ACTIVE JUDGES) (tm)

11/21/96 Filed order (Mary M. SCHROEDER, Harry PREGERSON, Charles E. WIGGINS) denying petition for enbanc [sic] rehearing and rejecting suggestion for rehearing en banc. [93-15924] (sa)

Coale, Kananack & Murgatroyd
12100 Wilshire Blvd., #650
Los Angeles, CA 90025
(213) 207-3233

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of Philip Lewis, Deceased, Plaintiffs, vs. COUNTY OF SACRAMENTO; SACRAMENTO COUNTY SHERIFFS DEPARTMENT; THE STATE OF CALIFORNIA; JAMES EVERETT SMITH; AND DOES 1 to 100, Inclusive, Defendants.	CASE NO. 519277 **COMPLAINT AND JURY DEMAND FOR PERSONAL INJURIES, WRONGFUL DEATH AND DEPRIVATION OF CIVIL RIGHTS (42 USC §1983)**

COME NOW the Plaintiffs, TERI LEWIS and THOMAS LEWIS, as Personal Representatives of the Estate of Philip Martin Lewis, deceased, for their complaint, sue the Defendants, COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA, JAMES EVERETT SMITH and DOES 1 TO 100, inclusive, as follows:

COUNT ONE

Deprivation by Defendants of Decedent's Fourteenth Amendment Rights

1. This cause of action is brought pursuant to 42 USC §1983 and §1988 as a consequence of Defendants' having violated certain rights guaranteed under the United States Constitution by wrongfully and fatally injuring Decedent Philip Lewis.

2. Plaintiffs TERI LEWIS and THOMAS LEWIS (sometimes hereinafter collectively referred to as Plaintiffs LEWIS) are adult citizens of the United States and are residents of Sacramento County, California. On or about March 8, 1991, TERI LEWIS and THOMAS LEWIS were issued Letters of Special Administration appointing them as the Personal Representatives of the Estate of Philip Lewis by the Superior Court of California, County of Sacramento. Decedent Philip Lewis, a minor, was survived by his parents, TERI LEWIS and THOMAS LEWIS, and his brother, Eric Lewis. Decedent Philip Lewis' surviving heirs-at-law are his parents, TERI LEWIS and THOMAS LEWIS.

3. Defendant County of Sacramento is, and at all times mentioned herein was, a county duly organized and existing under the laws of the State of California.

4. Defendant Sacramento County Sheriffs Department is, and at all times mentioned herein was, a political subdivision of the County of Sacramento, duly organized and existing under the laws of the State of California and situated in Sacramento County.

5. Defendant State of California is, and at all times mentioned herein was, a sovereign state of the United States of America.

6. Defendant James Everett Smith is, and at all times mentioned herein was, an officer and employee of the Sacramento County Sheriffs Department and in doing the things hereinafter described, acted within the scope of his employment.

7. At all times mentioned, Defendant Smith was driving and operating Sheriffs Department Patrol Car #942, California license E204848, with the consent permission and knowledge of the Sacramento County Sheriffs Department, County of Sacramento and State of California.

8. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as DOES 1-100, inclusive, and therefore sues these defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. (Plaintiffs are informed and believe and thereon allege that each of such fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiffs' injuries as herein alleged were proximately caused by such negligence.)

9. At all times herein mentioned, each of the defendants sued herein, including DOES 1-100, was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.

10. At all times mentioned herein, Defendant Smith was acting under the color of state law, to wit, under the color of the statutes, ordinances, regulations, policies, customs and usages of the State of California and the Sacramento County Sheriffs Department.

11. On or about May 22, 1990 at approximately 8:45 p.m. local time, Decedent Philip M. Lewis was a passenger on a motorcycle being driven by Brian A. Willard, southbound on Chestnut Avenue, Sacramento County, California.

12. At such time and place, Defendant Smith was operating a motor vehicle owned by Defendant Sacramento County within the scope of his employment. Defendant Smith was operating his vehicle in the vicinity of Orangevale in the County of Sacramento.

13. Officer Smith had noticed that the motorcycle being driven by Brian Willard was speeding. Officer Smith noticed that there were two young people on the motorcycle. Officer Smith made a three-point turn and gave chase without notifying his dispatcher.

14. When the motorcycle reached the intersection of Chestnut Avenue and Orangevale, Brian Willard attempted to turn east onto Orangevale Avenue, at which time, Officer Smith's vehicle struck the motorcycle and Decedent Philip M. Lewis.

15. Defendant Smith had been left with his own discretion regarding initiating a high-speed chase and without training in conducting such a chase. He operated his vehicle in a reckless and careless manner in that he pursued Mr. Willard at high speeds; failed to take proper

steps so as to avoid an accident; and initiated and continued the pursuit simply on the basis of having observed Mr. Willard speeding and believing a traffic misdemeanor was occurring. Accordingly, Defendant Smith operated his vehicle in violation of the motor vehicle rules and regulations in full force and effect in the State of California. Further, he acted in a reckless and careless manner in failing to call off the chase and failing to report to and liaise with his dispatcher.

16. At such time, the defendant's vehicle was so improperly operated that it struck the subject motorcycle and Decedent Philip Lewis.

17. As a direct and proximate result of the unlawful conduct of Defendant Smith, without any negligence whatsoever on the part of Philip M. Lewis contributing thereto, the Decedent sustained fatal injuries.

18. Defendant Smith deprived Decedent Philip M. Lewis of his Fourteenth Amendment right to life, liberty and property without due process of law when he operated his vehicle with recklessness, gross negligence and conscious disregard for his safety. These actions were taken with willful and wanton disregard for the constitutional rights of Decedent Philip M. Lewis. In doing the acts herein alleged, defendants, and each of them, acted with oppression, fraud and malice and plaintiffs are entitled to punitive damages.

19. As a result of the unlawful acts described above, Decedent Philip Lewis property damage to his motorcycle and clothing, physical pain and discomfort and emotional distress prior to his death; and as a consequence of his death, Plaintiffs have incurred and continue to incur

medical expenses, funeral and burial expenses, loss of support, services, aid, association, protection, companionship, comfort, care and society of their decedent, and the loss of their respective shares in such estate as their decedent might reasonably have accumulated in his natural life expectancy.

WHEREFORE, Plaintiffs demand judgment against defendants for:

a. compensatory damages according to proof;

b. punitive damages according to proof;

c. personal property damage according to proof;

d. interest and costs of this action;

e. attorneys fees pursuant to 42 USC §1988; and

f. such other relief as the court may deem proper.

COUNT TWO

Deprivation by Defendants of Decedent's Fourteenth Amendment Rights

20. Paragraphs 1 through 19 of this complaint are incorporated herein by reference.

21. Although the Defendant Sacramento County Sheriffs Department was responsible for training police officers, it provided no specialized training to officers including the individual defendant, on the subject of high-speed chases. This failure to train made it inevitable that life-threatening collisions would occur and

amounted to a deliberate indifference to the rights of those using the public highways. Requiring officers to apprehend fleeing suspects and giving officers the discretion of determining when to initiate high-speed chases makes the need for special training in high-speed chases so obvious and the failure to do so is so likely to result in the violation of constitutional rights, that these defendants can be reasonably said to have been deliberately indifferent to the need for such training.

22. Other high-speed chases have been undertaken by officers of the Defendant's police departments with such frequency and with such little provocation that it can be fairly concluded that these defendants have a custom and practice of encouraging such chases for the sake of apprehending suspects, however minor the violation, at the expense of the safety and well-being of the innocent members of the public. This conscious choice to pursue an inadequate policy proximately resulted in the individual defendants having the obligation and discretion to engage in the high-speed chase that ended in the death of Philip M. Lewis.

23. These defendants' foregoing failure to train and the custom of permitting high-speed chases without adequate provocation deprived Decedent Philip M. Lewis of his Fourteenth Amendment right to life, liberty and property without due process.

24. The aforesaid grossly negligent, reckless and intentional acts and omissions of this defendant was a proximate cause of the injuries suffered by Decedent Philip M. Lewis and by the Plaintiffs.

25. These defendants subjected Decedent Philip M. Lewis to such deprivation by either malice or a reckless disregard of his rights, and Plaintiffs are entitled to punitive damages.

WHEREFORE, Plaintiffs demand judgment against defendants for:

a. compensatory damages according to proof;

b. punitive damages according to proof;

c. personal property damage according to proof;

d. interest and costs of this action;

e. attorneys fees pursuant to 42 USC §1988; and

f. such other relief as the court may deem proper.

COUNT THREE

Against All Defendants, and Each of Them, For Negligent Operation of Motor Vehicle

26. Paragraphs 1 through 17 of this complaint are incorporated herein by reference.

27. James Everett Smith's operation of Sacramento Sheriffs Department patrol car #942, California license E204848 that he drove, as set forth in paragraphs 16 and 17, breached his duty to operate said motor vehicle with due care.

28. As the owners of the vehicle operated by Defendant James Everett Smith and as Defendant Smith's employer, the County of Sacramento, Sacramento County

Sheriffs Department and the State of California are liable for the death of Decedent Philip M. Lewis.

29. During all times pertinent to the claims at issue, Defendant James Everett Smith was acting within the course of his employment and engaging in the performance of his duties. As such, the County of Sacramento, Sacramento County Sheriffs Department and the State of California are liable for the negligent acts of Defendant Smith.

30. At the above-stated time and place, defendants, and each of them, so negligently, carelessly, recklessly, and unlawfully entrusted, managed, maintained, drove, operated and controlled the patrol vehicle described herein in an arbitrary manner, so as to proximately cause it to collide forcefully with Decedent Philip M. Lewis.

31. Defendant Smith's negligent operation of the vehicle proximately resulted in the collision that killed Decedent Philip M. Lewis.

32. As a result of the foregoing actions, the Decedent Philip M. Lewis was caused to suffer greatly before he died. Decedent Philip Lewis's estate and his surviving family members suffered damages pursuant to the California wrongful death and survival statutes as follows: Decedent Philip Lewis suffered property damage to his motorcycle and clothing, physical pain and discomfort and emotional distress prior to his death; and as a consequence of his death, Plaintiffs have incurred and continue to incur medical expenses, funeral and burial expenses, loss of support, services, aid, association, protection, companionship, comfort, care and society of their decedent, and the loss of their respective shares in such estate

as their decedent might reasonably have accumulated in his natural life expectancy.

WHEREFORE, Plaintiffs demand judgment against defendants for:

a. compensatory damages according to proof;

b. personal property damage according to proof;

c. interest and costs of this action; and

d. such other relief as the court may deem proper.

DATED this 8 day of March, 1991.

COALE, KANANACK & MURGATROYD

By: /s/ Michael L. Baum
MICHAEL L. BAUM, ESQ.
12100 Wilshire Blvd., #650
Los Angeles, CA 90025
(213) 207-3233

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS Personal Representative of the Estate of PHILIP LEWIS,

Plaintiffs,

v.

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100,

Defendants.

_____ /

No. Civ. S-91-505 GEB/GGH

(Filed Nov. 11, 1992)

MOTION FOR TOTAL OR PARTIAL SUMMARY JUDGMENT

Terence J. Cassidy – Bar No. 99180
John R. Thacker – Bar No. 137722
Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Sacramento, CA 95825
(916) 929-1481
Attorneys for Defendants
COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERETT SMITH

TABLE OF CONTENTS

		Page
	TABLE OF AUTHORITIES	i, ii, iii
I	INTRODUCTION	1
II	APPLICABLE LEGAL STANDARD TO A MOTION FOR SUMMARY JUDGMENT	10
III	PLAINTIFFS CANNOT SHOW THAT DEFENDANTS ACTED RECKLESSLY, ARBITRARILY OR IN ANY WAY THAT WOULD SHOCK ONE'S CONSCIENCE	11
IV	ANY CLAIM OF VIOLATION OF PLAINTIFFS' FOURTH AMENDMENT RIGHTS MUST FAIL AS THERE WAS NO SEIZURE BY ANY GOVERNMENTAL BODY OR EMPLOYEE	16
V	DEFENDANT OFFICER SMITH SHOULD BE ACCORDED GOOD FAITH QUALIFIED IMMUNITY	20
VI	PLAINTIFFS' CONSTITUTIONAL DEPRIVATIONS, IF ANY, WERE NOT CAUSED BY A POLICY, ORDINANCE, REGULATION OR DECISION OF THE DEFENDANTS	23
VII	DEFENDANTS ARE IMMUNE FROM A NEGLIGENCE ACTION PURSUANT TO CALIFORNIA GOVERNMENT CODE SECTION 845.8(b) AND CALIFORNIA VEHICLE CODE SECTIONS 17004 AND 17004.7	28
VIII	PLAINTIFFS CANNOT AS A MATTER OF LAW SHOW THAT DEFENDANTS WERE THE PROXIMATE CAUSE OF PHILIP LEWIS' DEATH	35
IX	CONCLUSION	36

EXHIBITS A THROUGH K

PROOFS OF SERVICE

TABLE OF AUTHORITIES

	Page
Almeida v. Town of North Providence, 468 A.2d 915 (1983)	35, 36
Anderson v. Creighton, 483 U.S. 635, 641 (1987)	20
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)	11
Brinkman v. Rahm, 878 F.2d 262 (9th Cir. 1989)	17
Britt v. Little Rock Police Dept., 721 F. Supp. 189, 191 (E.D.Ark. 1989)	11, 12, 14, 15, 16, 25
Brower v. County of Inyo, 489 U.S. 593, 595 (1989)	17, 18
Cannon v. Taylor, 782 F.2d 947, 949 (5th Cir. 1986)	12, 13, 14, 26, 27
Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)	10
Chambers v. Ideal Pure Milk, 245 S.W.2d 589 (1952)	35
City of Canton v. Harris, 489 U.S. 378, 389-91 (1986)	24, 27
City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)	24, 25
Daniels v. Williams, 474 U.S. 327, 331 (1986)	13, 14
Davidson v. City of Westminster (1982) 23 Cal.3d 197	29, 31
DeNieva v. Reyes, 966 F.2d 480 (9th Cir. 1992)	20, 21
Galas v. McKee, 801 F.2d 200 (6th Cir. 1986)	15, 17, 18, 19, 20

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) 20

Hill v. California, 401 U.S. 797, 802-805 (1971)..... 17

Hooper v. City of Chula Vista (1989) 212 Cal.App.3d 442..... 28, 29, 30, 31, 32, 33

Hunter v. Bryant, 112 S. Ct. 534 (1991) 20, 23

Jones v. Sherill, 827 F.2d 1102 (6th Cir. 1987)..... 15

Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985) 10

Kishida v. State (1991) 229 Cal.App.3d 329 .....32, 34

Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 547, 586 (1986) 10, 11

Meredith v. State of Arizona, 523 F.2d 481, 484 (1975) 13

Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978).....23, 28

Oklahoma City v. Tuttle, 471 U.S. 808, 823, 105 (1985) 23, 24, 28

Oviatt v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1991) 24

Parratt v. Taylor, 451 U.S. 527 (1981).....13, 14

Paul v. Davis, 424 U.S. 693 (1976) 13, 14

Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) 23, 24

Reenders v. City of Ontario (1977) 68 Cal.App.3d 1045 .....29, 30

Richardson v. City of Indianapolis, 658 F.2d 494 (7th Cir. 1981) 15

Rizzo v. Goode, 423 U.S. 362 (1976) 23

Rochin v. California, 342 U.S. 165, 72, 174 (1952) 13

Roll v. Timberman, 229 A.2d 281 (1967) 35

Romero v. Kipsap County, 931 F.2d 624, 627 (9th Cir. 1991).....20, 21

Rucker v. Hartford County, MD, 946 F.2d 278, 281 (4th Cir. 1991)..... 12, 13, 14

Tennessee v. Garner, 471 U.S. 1 (1985)..... 17

Timken v. Frederick County Commissioners, 945 F.2d 716 (4th Cir. 1991).....12, 13

Ward v. County of San Diego, 791 F.2d 1329, 1332 (1986) 21

Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987)..... 11

STATUTES

FRCP 56(c) 10

Government Code Section 845.8.....28, 30

Government Code Section 845.8(b) 28, 31

Penal Code Section 192.1 8

Rule 56(c) 42 USC Section 1983 8

Vehicle Code Section 17001 .....28, 30

Vehicle Code Section 17004 ..... 28, 31, 32, 34

Vehicle Code Section 17004.7.....28, 31, 32, 34, 35

Vehicle Code Section 17004.7(d)..... 32

Vehicle Code Section 20001 8

Vehicle Code Section 22107 8

Vehicle Code Section 24603(f) 8

Vehicle Code Section 2800.3..... 8

42 USC Section 1983..... 2, 11, 13, 20, 23, 25

Law Offices Of

Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(916) 929-1481

TERENCE J. CASSIDY – #99180
JOHN R. THACKER – #137722
(0068:0281)

ATTORNEYS FOR: Defendants COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS Personal Representative of the Estate of PHILIP LEWIS, Plaintiffs, vs. COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants. _____ /	No. Civ. S-91-505 GEB/GGH **NOTICE OF MOTION FOR TOTAL OR PARTIAL SUMMARY JUDGMENT** **DATE:** December 7, 1992 **TIME:** 9:00 A.M. **DEPT:** 6 TRIAL DATE: May 18, 1993

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN THAT at the above time, date and department, defendants COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERETT SMITH will move the court for summary judgment on the following grounds:

1. For summary judgment on the First Cause of Action on the grounds that plaintiffs have failed to establish a violation of Federal Civil Rights under 42 U.S.C. 1983;

2. For summary judgment dismissing JAMES E. SMITH for alleged violations of Federal Civil Rights based upon the good faith qualified immunity;

3. For summary judgment in favor of defendants COUNTY OF SACRAMENTO and SACRAMENTO COUNTY SHERIFF'S DEPARTMENT with respect to plaintiffs' Second Cause of Action on the ground that plaintiffs have failed to establish a custom or practice of violating Federal Civil Rights;

4. For summary judgment in favor of COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES E. SMITH with respect to plaintiffs' Third Cause of Action pursuant to California Government Code Section 845.8(b) and California Vehicle Code Sections 17004 and 17004.7; and

5. For summary judgment in favor of COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES E. SMITH with respect to the Third Cause of Action on the grounds that plaintiffs have failed to establish proximate cause as a matter of law.

Said motion will be based upon this notice, the attached memorandum of points and authorities and supporting declaration and exhibits, the pleadings, papers and records on file herein, and on such other oral and documentary evidence as may be presented at the time of hearing.

Dated: NOVEMBER 11, 1992

PORTER, SCOTT, WEIBERG
& DELEHANT
A Professional Corporation

By: /s/ John R. Thacker
TERENCE J. CASSIDY
JOHN R. THACKER

Law Offices Of
Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(916) 929-1481

Terence J. Cassidy – #99180
John R. Thacker – #137722

ATTORNEYS FOR: Defendants
COUNTY OF SACRAMENTO,
SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and
JAMES EVERETT SMITH

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS Personal Representatives of the Estate of PHILIP LEWIS, Plaintiffs, v. COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants. _____/	No. Civ. S-91-505 GEB/ GGH **MOTION FOR TOTAL OR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF TERENCE J. CASSIDY** **DATE:** December 7, 1992 **TIME:** 900 a.m. **DEPT:** 6

Defendants COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERETT SMITH hereby move for total or partial summary judgment and submit the following memorandum of points and authorities, exhibits and separate statement of undisputed facts in support thereof.

I

INTRODUCTION

This action arises out of claims by plaintiffs, TERI and THOMAS LEWIS, as personal representatives of the estate of PHILIP LEWIS, for deprivations of federal civil rights and wrongful death as a result of a police pursuit instigated by the fleeing decedent PHILIP M. LEWIS and Brian Willard which ended in the death of PHILIP LEWIS. (See complaint of plaintiffs filed March 11, 1991). Named defendants include COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and SACRAMENTO COUNTY SHERIFF'S DEPUTY JAMES E. SMITH, the operator of the patrol unit involved in the pursuit.

Plaintiffs' first cause of action alleges that Officer SMITH violated plaintiffs' rights under the Fourteenth Amendment pursuant to 42 USC Section 1983 in that he operated his patrol car in a reckless and careless manner in failing to call of [sic] the chase and failing to report to his dispatcher. Plaintiffs further allege that such actions were taken with willful and wanton disregard for the constitutional rights of decedent PHILIP M. LEWIS. Plaintiffs' second cause of action is a Monell type claim

against the COUNTY OF SACRAMENTO and the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT which alleges that defendants' failure to train made it inevitable that life threatening collisions would occur and that such failure amounted to a deliberate indifference to the rights of those using the public highways. Plaintiffs also allege that this failure to train and a custom of permitting high speed chases without adequate provocation deprived decedent PHILIP M. LEWIS of his Fourteenth Amendment right to life, liberty and property without due process. Plaintiffs' third cause of action alleges negligence by Officer SMITH in the operation of a motor vehicle.

The events which led up to PHILIP LEWIS' death are as follows On May 22, 1990, at approximately 8:30 p.m., Sacramento County Sheriff's Deputy JAMES EVERETT SMITH and Officer Murray Stapp responded to a 415 Penal Code fight call at 9336 Orangevale Avenue, Orangevale. (SMITH's statement to CHP Investigator Ronald Snider, page 1, attached hereto as Exhibit A). They handled the call, returned to their patrol cars and were ready to leave. (SMITH's statement, page 1). Officer Stapp heard a motorcycle revving and then observed the motorcycle approach his location at a high rate of speed. (Stapp's statement to CHP Investigator Ronald Snider, page 1, attached hereto as Exhibit B). It was later learned that the motorcycle was mounted by driver Brian Willard and passenger PHILIP LEWIS. Officer Stapp turned on his overhead lights and the motorcycle slowed down and continued towards his location. (Stapp's statement and deposition of JAMES SMITH, page 54, lines 18-19, attached hereto as Exhibit C). Officer Stapp pulled his car into the street in an attempt to block the path of the

motorcycle. (Deposition of JAMES SMITH, page 54, line 19). The motorcycle continued up in between Officer Stapp's patrol car and Officer SMITH's patrol car. (Deposition of JAMES SMITH, page 54, line 17; Stapp's statement). Officer Stapp yelled at the driver to pull over so that they could talk. (Deposition of JAMES SMITH, page 54, line 22; Stapp's statement, page 1). Officer Stapp heard one of the two guys on the motorcycle say "fuck it, let's get out of here". (Stapp's statement). The two motorcycle riders were not supposed to be seen together per "his" probation officer and PHILIP therefore told Willard to keep going when Officer Stapp told them to stop. (Willard's recorded statement given at North Sacramento CHP Office to CHP Investigating Office Ronald Snider, page 1, attached hereto as Exhibit D; see also Deposition of JAMES SMITH, page 108, lines 1-8).

The motorcycle maneuvered between the two patrol cars and accelerated away at a high rate of speed. (Deposition of JAMES SMITH, page 55, lines 2-4; SMITH's statement, page 1). Neither of the individuals on the motorcycle were wearing helmets (Stapp's statement and SMITH's statement). Officer SMITH accelerated after the motorcycle with his patrol car red lights and siren turned on. (Deposition of JAMES SMITH, page 35, lines 9-15). From start to finish the pursuit lasted approximately one minute and 15 or 20 seconds. (Deposition of JAMES SMITH, page 43, lines 19-21). It was Officer SMITH's decision to continue or terminate the pursuit. (Deposition of JAMES SMITH, page 19, lines 15-20). At no time during pursuit did Officer SMITH know the identity and age of the individuals or the license number of the fleeing motorcyclists. (Deposition of JAMES SMITH, page 19,

lines 26-28 and page 74, lines 25-27). Officer SMITH estimates that his speed was less than 80 miles per hour but more than 30 miles per hour. (Deposition of JAMES SMITH, page 23, lines 2-4).

During the pursuit, several cars had to swerve onto the shoulder of the road to avoid the speeding motorcycle. (Deposition of JAMES SMITH, page 33, lines 2-6). By pursuing Willard and LEWIS, Officer SMITH hoped to stop their erratic driving which included driving on the wrong side of the street, and thereby prevent inevitable injury to others. (Deposition of JAMES SMITH, page 29, line 12). His intention at the start of the pursuit was to get Willard and LEWIS to pull over and stop; that intention did not change at any time during the pursuit. (Deposition of JAMES SMITH, page 29, line 12). As Officer SMITH pursued the suspects he was careful to slow down at intersections and because of this was able to make turns without screeching his tires or losing control of his vehicle. (Deposition of JAMES SMITH, page 47, lines 2-21 and page 75, lines 24-page 76, line 1). Officer SMITH maintained a distance of approximately 200 plus feet between his patrol vehicle and the fleeing motorcycle. (Deposition of JAMES SMITH, page 48, lines 1-4).

As mandated by SACRAMENTO COUNTY SHERIFF'S DEPARTMENT (SCSD) pursuit policy, Officer SMITH attempted to notify dispatch of his pursuit, and the general direction it was proceeding, but he was unable to do so. (Deposition of JAMES SMITH, page 66, line 27). He believes he tried to notify them twice, and realized both times that he was unsuccessful. (Deposition of JAMES SMITH, page 66, line 27). His radio was on the

car-to-car channel instead of the dispatch channel. (Deposition of JAMES SMITH, page 69, line 18).

Willard and LEWIS were endangering the public by constantly swerving, using both oncoming and ongoing lanes. (Deposition of JAMES SMITH, page 32, line 22). Witness Peter Berg stated that while he was riding his bicycle that evening he was forced to jump off his bicycle in order to avoid being hit by the motorcycle. (Peter Berg's statement given to CHP Investigator Ronald Snider, attached hereto as Exhibit E). Berg stated that the motorcycle missed him by approximately one to one and one half feet. (Peter Berg's statement). He also stated that a patrol car with top lights and siren on was following behind the motorcycle at approximately 100 yards. (Peter Berg's statement). Willard and LEWIS went over a crest in the road and as Officer SMITH went over the crest, he observed Willard attempt to make a left turn. (Deposition of JAMES SMITH, page 53, lines 8-28). As he was making a left turn, Officer SMITH saw smoke coming from the rear tire of the motorcycle and it appeared to Officer SMITH that the motorcycle had just stopped. (Deposition of JAMES SMITH, page 53, lines 16-17). The driver either fell off or bailed off of the motorcycle. (SMITH's statement). The passenger, LEWIS, appeared to be either jumping backward or was thrown backward. (Deposition of JAMES SMITH, page 88, line 13 and page 96, line 2).

The motorcycle brakes locked up when Willard began to make a left turn. (Willard's statement, page 1). Willard told investigating officers that the motorcycle was going down on its left side. (Willard's statement, page 1).

Officer SMITH started to brake heavily when he noticed Willard and LEWIS were slowing down. (Deposition of JAMES SMITH, page 53, line 24-page 54, line 2). He continued to brake until he observed Willard and LEWIS stop. He let off on the brakes and pulled off to the right side of the road. (Deposition of JAMES SMITH, page 89, lines 12-15). Officer SMITH then observed a spray of blood across his car's windshield and observed the passenger, LEWIS, being propelled into the air in front of his patrol car. (Deposition of JAMES SMITH, page 89, lines 18-22). Officer SMITH then saw LEWIS roll down the road. (Deposition of JAMES SMITH, page 86, lines 2-4 and page 89, line 22; SMITH's statement, page 2).

Officers SMITH and Stapp never saw a brake light from the motorcycle come on during the pursuit. (SMITH's and Stapp's statements). Willard did not know if the brake light worked. (Willard's statement, page 2). Witness Jason Virga stated that he knew the brake light was on all the time when the motorcycle was running. (Jason Virga's recorded statement given to CHP Investigator Ronald Snider, attached hereto as Exhibit F). He thought it was because Brian Willard and PHILIP LEWIS had messed with the fuses. (Virga's statement). CHP accident investigator Ronald Snider testified in deposition that he tested the brake lights and found that when the key was turned to the on position, the brake light stayed on all the time. (Deposition of Ronald Snider, page 37, lines 21-28, attached hereto as Exhibit G).

When the pursuit ended, Officer SMITH ended up on someone's front lawn. (Deposition of JAMES SMITH, page 24, line 11 and page 85, line 8). He looked out of his

patrol car window and observed LEWIS lying still in the street. (Deposition of JAMES SMITH, page 25, lines 9-13). After approaching LEWIS, Officer SMITH observed no signs of life. (Deposition of JAMES SMITH, page 26, line 18).

Officer SMITH requested life-flight, advised dispatch of his pursuit and checked on passenger LEWIS. (Deposition of JAMES SMITH, page 27, lines 5-7, page 102, lines 1-5 and SMITH's statement). Officer SMITH never observed the driver of the motorcycle after the accident. (Deposition of JAMES SMITH, page 104, lines 2-5 and SMITH's statement). LEWIS was pronounced dead at the scene of the accident.

Officer SMITH has been a Sacramento Sheriff's Deputy for approximately 20 years and has had training in controlling high speed chases in advanced officer's school. (Deposition of JAMES SMITH, page 105, lines 12-19 and page 106, line 10).

There was no evidence to indicate that there was any legal intervention, or the ramming of Willard's motorcycle by the patrol car, on the part of Officer SMITH. (Deposition of Ronald Snider, page 34, lines 11-16; Deposition of D.P. Van Blaricom, page 101, lines 15-22, attached hereto as Exhibit H).

Snider's investigation further led him to conclude that there was no evidence to indicate that Officer SMITH should have broken off the pursuit. (Deposition of Ronald Snider, page 39, lines 17-28). Plaintiff's expert D.P. Van Blaricom agreed in deposition that after Willard and LEWIS committed two infractions beyond the failure to yield to Officer Stapp which were observed by Officer

SMITH, Officer SMITH had the right to attempt to pull the two individuals over. (Deposition of D.P. Van Blaricom, page 59, lines 10-22).

In addition to a defective brake light, Snider stated that the inspection of the motorcycle at Hirst Auto Wreckers revealed that the tire pressure in the tires were not properly inflated, thus greatly affecting the stability of the motorcycle. (Deposition of Ronald Snider, page 40, line 28-page 41, line 9).

After considering all of the evidence obtained during the investigation and based upon his 20 years of training and experience, Snider concluded that LEWIS died entirely as a result of the actions of Brian Willard. (Deposition of Ronald Snider, page 46, line 21-23). Brian Willard was subsequently charged with violating Vehicle Code Section 2800.3, evading arrest resulting in death (Deposition of Ronald Snider, page 43, lines 4-7); violation of Vehicle Code Section 22107, making an unsafe turning movement (Deposition of Ronald Snider, page 43, lines 3-5); violation of Vehicle Code Section 24603(f), defective brake light (Deposition of Ronald Snider, page 44, lines 5-6); Vehicle Code Section 20001, felony hit and run (Deposition of Ronald Snider, page 45, lines 22-24); and Penal Code Section 192.1, manslaughter with gross negligence (Deposition of Ronald Snider, page 45, lines 21-22).

Finally, expert Ronald C. Dart, III testified in deposition that in his opinion, the pursuit was conducted appropriately. (Deposition of Ronald Dart, page 9, line 25-page 10, line 1). Moreover, all experts agree that the Department's general order does meet and probably exceeds the requirements of Vehicle Code Section 17004; that there

appears to be no attempt at legal intervention, nor did it occur; and that the officer in question, Officer SMITH, meets the minimum standards required in the State of California for training as it relates to vehicle operation and hot pursuits. (Deposition of Ronald Dart, page 9, line 25 through page 10, line 7, attached hereto as Exhibit I; deposition of D.P. Van Blaricom, page 86, line 16-page 87,1ine 16; deposition of Darrel W. Neufeld, page line 26-page 81, line 3, attached hereto as Exhibit J). Additionally, in his expert opinion, Officer SMITH never lost control of his patrol car. (Deposition of Ronald Dart, page 14, lines 13-16; deposition of JAMES SMITH, page 84, lines 19-21). He did not feel that the application of the brakes and locking of the wheels was a loss of control; the mere fact that the vehicle may have been traveling 60 to 65 miles an hour and then entered into a locked wheel skid does not mean he was out of control. (Deposition of Ronald Dart, page 14, line 13-page 15, line 16).

Defendants bring this motion for summary judgment on the grounds that plaintiffs, as a matter of law, cannot show that defendants acted recklessly, arbitrarily or even negligently; and they cannot show that any SCSD policy caused a constitutional deprivation. Furthermore, defendants cannot be found liable on a claim of negligence as a matter of law based on governmental immunities.

II

APPLICABLE LEGAL STANDARD TO A MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law, FRCP 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985).

Under summary judgment practice, the moving party:

> [a]lways bears the initial responsibility of informing the District Court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. In such a circumstance, summary judgment should be granted "so long as whatever is before the strict Court demonstrates that the standard for entry of summary judgment, as set fort in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist.

Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 547, 586 (1986).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. FRCP 56(e); *Matsushita*, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*, at 248-49; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party must do more than simply show that there is some metaphysical doubt as to the material facts . . . where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587.

III

PLAINTIFFS CANNOT SHOW THAT DEFENDANTS ACTED RECKLESSLY, ARBITRARILY OR IN ANY WAY THAT WOULD SHOCK ONE'S CONSCIENCE

Plaintiffs' first cause of action is pursuant to 42 USC Section 1983. There are two plausible avenues to analyzing a 1983 claim involving pursuits. *Britt v. Little Rock Police Dept.*, 721 F. Supp. 189, 191 (E.D.Ark. 1989). A

culpable deprivation of life, liberty or property by one acting under a color of state law could be viewed as a violation of substantive due process. *Id.* at 191. Alternatively, the injuries inflicted on plaintiff could be considered to be part of the officer's attempted seizure of the fleeing suspect, so that an unreasonable pursuit in the nature of excessive force would violate the Fourth Amendment. *Id.* at 191-192.

In order to sustain a 1983 action, plaintiff must make a prima facie showing that the act or omission of a person acting under color of state law deprived plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States. *Cannon v. Taylor*, 782 F.2d 947, 949 (5th Cir. 1986). Section 1983 is not self-executing; the statute itself creates no substantive rights. Although the right to life is an interest of constitutional dimension, not every deprivation of life amounts to a constitutional and gives rise to a claim under Section 1983. *Id.* at 949. The Fourteenth Amendment protects against only those deprivations of life with [sic] are affected without due process of law. *Id.*

Plaintiffs' first cause of action alleges that defendants deprived PHILIP M. LEWIS of his Fourteenth Amendment right to life, liberty and property without due process of law. The Fourteenth Amendment guards against improper governmental deprivations not expressly prohibited by express provisions of the incorporated portions of the Bill of Rights. *Britt v. Little Rock*, 721 F. Supp. at 192.

Substantive due process guarantees embodied in the due process clause protect everyone subject to its general

protection against being physically injured by agents of the state acting irrationally and arbitrarily, without regard to whether the injury was intended to be inflicted upon the victim. *Timken v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991); *Rucker v. Hartford County, MD*, 946 F.2d 278, 281 (4th Cir. 1991). The protection runs "only to state actions so arbitrary and irrational, so unjustified by any circumstance or governmental interest as to be literally incapable of avoidance by any pre-deprivation procedural protection or of adequate rectification by any post-deprivation state remedies. *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Rucker v. Hartford County, MD*, 946 F.2d at 281. Constitutional protection of the Fourteenth Amendment due process clause is not synonymous with that afforded by the common law against torts. *Meredith v. State of Arizona*, 523 F.2d 481, 484 (1975).

Irrationality and arbitrariness imply a most stringent standard against which an action is to be measured in assessing a substantive due process claim. *Rucker v. Hartford County, MD*, 946 F.2d at 281. The state employee's conduct must "amount to a brutal and inhumane abuse of official power literally shocking to the conscience. *Rochin v. California*, 342 U.S.165, 72, 174 (1952). (This is conduct that shocks the conscience; illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach contents – this offends evenhanded sensibilities). *See also Timken v. Frederick*, 945 F.2d at 720; *Rucker v. Hartford County, MD*, 946 F.2d at 281.

In *Cannon v. Taylor*, 782 F.2d 947, the plaintiff was killed when a police vehicle driven by an officer struck

her automobile. The court rejected her personal representative and children's claim brought under 42 USC 1983 against the officer and the City of Columbus. The court quoted *Paul v. Davis*, 424 U.S. 693 (1976) and *Parratt v. Taylor*, 451 U.S. 527 (1981) in making their decision. The Supreme Court in these cases held that:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would also necessarily result in turning every alleged injury which may have been inflicted by a state official action under 'color of law' into a violation of the Fourteenth Amendment cognizable under Section 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale, any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under Section 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the state'. We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

Paul v. Davis, 424 U.S. at 701; *Parratt v. Taylor*, 451 U.S. at 544.

The *Cannon* court went on to ultimately hold that negligence or even gross negligence in the operation of a motor vehicle by a policeman acting in the line of duty do not give rise to a Section 1983 cause of action for violation of a federal right. *Cannon v. Taylor*, 782 F.2d at 950; *see also Britt v. Little Rock*, 721 F. Supp. at 192; *Rucker v. Hartford*

County, MD, 946 F.2d at 282. This conduct does not rise to a constitutional deprivation. *Cannon v. Taylor*, 782 F2d. at 950 (*see also Britt v. Little Rock*, 721 F. Supp. at 192.

Therefore, in order for LEWIS' Fourteenth Amendment violation claim to succeed, plaintiffs must prove that there was at least recklessness, defined as "intentionally doing an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow", on the part of defendants. *Britt v. Little Rock*, 721 F. Supp. at 192. Additionally, they must show that defendants' conduct was so irrational and arbitrary, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protection. *Daniels v. Williams*, 474 U.S. at 331; *Rucker v. Hartford County, MD*, 946 F.2d at 281. As a matter of law, plaintiffs cannot make such a showing.

The undisputed facts show that Willard and decedent LEWIS were told by Officer Stapp to pull over. It is undisputed that Officer Stapp was acting under color of law, that he had told them to pull over because they were violating the law, and that both Willard and LEWIS heard Officer Stapp order them to pull over. When Willard and LEWIS blatantly refused to do so, as is shown by LEWIS' statement "fuck it, let's get out of here", and instead decided to flee, Officer SMITH and Stapp gave pursuit. Such conduct by Officer SMITH certainly does not amount to a brutal and inhumane abuse of official power literally shocking to the conscience.

Given Willard and LEWIS' obvious willingness to injure them anyone else in order to escape arrest, as

evidenced by two near misses with civilian vehicles, erratic driving on both sides of the road, and a near collision with bicyclist Paul Berg, Officer SMITH was justified in pursuing them to try and stop further flight. Many pursuits end without any injury to anyone and it is not unreasonable to try and catch fleeing suspects. There is no constitutionally required policy of not pursuing those who present no apparent danger, let alone those who do pose such a threat. *Britt v. Little Rock*, 721 F. Supp at 195, quoting *Jones v. Sherill*, 827 F.2d 1102 (6th Cir. 1987); *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986); *Richardson v. City of Indianapolis*, 658 F.2d 494 (7th Cir. 1981). In our case, Willard and LEWIS did pose such a danger by their erratic driving. There is no evidence in this case which would support a finding that Officer SMITH's conduct shocked the conscience.

As the pursuit neared its end, Willard and LEWIS attempted to make an illegal left turn. This attempt resulted in the motorcycle going down as did both riders. The motorcycle was traveling at least 80 miles per hour, the motorcycle's brake lights were not working properly, the motorcycle's tire pressure was completely wrong and the riders had just traveled over a crest in the road. As Officer SMITH pursued the suspects he was careful to slow down at intersections and because of this was able to make turns without screeching his tires or losing control of his vehicle. Additionally, he maintained a distance of approximately 200 plus feet between his patrol vehicle and the fleeing motorcycle. When Officer SMITH came over the crest he attempted to stop his patrol car. None of these undisputed facts lend any support or inference to

the claim that defendants acted recklessly, arbitrarily or even negligently in the acts that ended in LEWIS' death.

A plaintiff who wishes to avoid summary judgment must come forward with evidence which reasonably suggests that the pursuing officer was reckless. *Britt v. Little Rock*, 721 F. Supp at 195. Since as a matter of law plaintiffs cannot do this, their 1983 Fourteenth Amendment claim of violation of due process and deprivation of life, liberty and property must fail.

IV

ANY CLAIM OF VIOLATION OF PLAINTIFF'S FOURTH AMENDMENT RIGHTS MUST FAIL AS THERE WAS NO SEIZURE BY ANY GOVERNMENTAL BODY OR EMPLOYEE

Defendants respectfully submit that the complaint only states a claim under the Fourteenth Amendment. Assuming arguendo the complaint is construed as containing a claim under the Fourth Amendment, plaintiffs cannot meet their burden of proof of establishing a deprivation of that constitutional right.

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), all members of the court agreed that a police officer's fatal shooting of

a fleeing suspect constituted a Fourth Amendment "seizure". *Id.* at 7 *see also Brower v. County of Inyo*, 489 U.S. 593, 595 (1989). The Supreme Court in *Brower* also agreed that a police chase in which the suspect unexpectedly loses control of his car and crashes does not constitute an unconstitutional seizure. *Id.* at 595. *See also Galas v. McKee*, 801 F.2d at 202-203.

Violation of the Fourth Amendment requires an intentional acquisition of physical control. *Brower v. County of Inyo*, 489 U.S. 596. A seizure occurs even when an unintended person or thing is the object of the detention or taking. *Id.* at 596; (*see also Hill v. California*, 401 U.S. 797, 802-805 (1971), but the detention or taking itself must be willful. *Brower v. County of Inyo*, 489 U.S. at 596. This is implicit in the word "seizure" which can hardly be applied to an unknowing act. *Id.*

> It is clear . . . that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied. . . . [In the situation where] the pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means – his loss of control of his vehicle and the subsequent crash.

Id. at 597. (*See also Brinkman v. Rahm*, 878 F.2d 262 (9th Cir. 1989); *Roach v. Fredericktown*, 693 F. Supp. 795.

Generally, the Fourth Amendment protects against "unreasonable seizures", not unreasonable or even outrageous conduct in general. *Galas v. McKee*, 801 F.2d at 202. Thus, the threshold question requires two separate analysis [sic]. *Id.* First, it must be determined whether there was a seizure. Second, even assuming arguendo that a high speed pursuit by a police officer is a seizure, it must be determined whether it is unreasonable method of seizing traffic offenders.

The Supreme Court in *Brower v. County of Inyo* decided the first part of this question. As quoted above, police pursuit, short of a roadblock, is not a seizure within the meaning of the Fourth Amendment. Even prior to *Brower v. County of Inyo*, federal courts have reached the very same conclusion.

In *Galas v. McKee* a pursuit ended when the driver of a fleeing vehicle lost control of his automobile, ran off the roadway and wrecked. The Sixth Circuit Court held:

> That the reasonableness of a seizure or method of seizure cannot be challenged under the Fourth Amendment unless there was a completed seizure (that is a restraint on the individual's freedom to leave), accomplished by means of physical force or show of authority. During the initial stages of the pursuit at issue here, plaintiff was not restrained at all. Rather than submitting to the show of authority, plaintiff chose to flee. During the latter stages – when plaintiff crashed – he was tragically not free to walk away. *This restraint on plaintiff's freedom to*

> *leave, however, was not accomplished by the show of authority but occurred as a result of plaintiff's decision to disregard it.*

Galas v. McKee, 801 F.2d at 203 (emphasis added).

In the present case, decedent LEWIS and Willard consciously and unequivocally decided to buck authority and flee. Their speed reached approximately 65 miles per hour. Their driving caused several cars to dodge out of their way, and their erratic swerving between lanes posed a serious threat to themselves and the public. In pursuing these people, Officer SMITH's only intention was to pull them over in order to talk with them. LEWIS and Willard disregarded authority and as a result of Willard's erratic and unlawful driving, crashed the motorcycle without any force, legal intervention or intent on the part of the SCSD. LEWIS' ultimate restraint of freedom was not accomplished by a show of authority, but occurred as a result of his and Willard's decision to disregard it. Further evidence of this is the fact that Willard was ultimately able to elude the SCSD. Therefore, the evidence in this case does not support a finding of a seizure.

The court in *Galas v. McKee*, 801 F.2d also addressed the "reasonableness" prong of the analysis. In concluding that high speed pursuits by police offices are a reasonable method of seizing traffic offenders, the court concluded that:

> The extent of the intrusion is minimal. Without question, high speed pursuits place the suspect, the officer, and the public in a general at risk of death or serious bodily injury. In that respect high speed pursuits are no different than the use

of firearms to apprehend fleeing suspects. However, it is the intrusiveness of the officer's conduct which must be weighed. By engaging in high speed pursuits, without more, police use absolutely no force. Similarly, the show of authority is de minimis. By activating his blue lights and siren, an officer directs a traffic violator to pull to the side of the road where the traffic violator can expect to be detained for a few minutes and released. When the traffic violator decides to flout that order and flee from the officer, and the officer responds by following the violator, the intrusiveness occasioned by the officer's conduct is slight.

. . .

The government's interest here includes that of apprehending traffic offenders. For us to hold as a matter of constitutional law that police officers are foreclosed from pursing [sic] traffic offenders who disregard their directive to pull over, would encourage violators to flee. Moreover, to strip police officers of the authority to pursue traffic violators would not only severely hamper the effective enforcement of the traffic laws, it would also encourage offenders sought to be stopped for traffic offenses, but guilty of more serious kinds, to flee."

Id. at 203-204.

In this case, Officer SMITH merely sought to pull over Willard and LEWIS for various vehicle code violations and failing to yield to Officer Stapp's directive to stop. This is precisely the type of pursuit deemed reasonable as a matter of law in the *Galas* case. Thus, there is no

question that the pursuit in this case meets the reasonableness requirement under the Fourth Amendment.

Therefore, as a matter of law, plaintiffs cannot succeed on a claim of the violation of the Fourth Amendment because there was no seizure and/or Officer SMITH's conduct was reasonable under the circumstances.

V

DEFENDANT OFFICER SMITH SHOULD BE ACCORDED GOOD FAITH QUALIFIED IMMUNITY

In actions brought pursuant to 42 USC Section 1983, peace officers are entitled to a qualified immunity if their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Hunter v. Bryant*, 112 S. Ct. 534 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

In the Ninth Circuit, "regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful". *DeNieva v. Reyes*, 966 F.2d 480 (9th Cir. 1992); *Romero v. Kipsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

In order to determine qualified immunity, the following inquires must be addressed: 1) the identification of the specific rights allegedly violated; 2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters;

and 3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue. *DeNieva v. Reyes*, 966 F.2d; *Romero v. Kipsap*, 931 F.2d at 627. Moreover, a law enforcement officer is not required to have "the kind of legal scholarship normally associated with law professors and academicians." *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (1986). In the present case, it appears from plaintiff's complaint that the substantive constitutional deprivations alleged against defendants are for deprivation of life without due process of law in violation of the Fourteenth Amendment and for unlawful seizure in violation of the Fourth Amendment.

With respect to the Fourth Amendment claim for unlawful seizure, the question regarding the applicability of the good faith qualified immunity in this case is whether a seizure existed at all, and whether these officers could have reasonably believed that the seizure was lawful.

First, plaintiffs cannot establish that a seizure occurred, as set forth in Section IV above. Second, defendant Officer SMITH was clearly acting within his authority when he pursued the fleeing suspects. Pursuits are an inherent part of any law enforcement and it is legally proper and within defendant Officer SMITH's rights to conduct a pursuit. His intent was not to seize PHILIP LEWIS by legal intervention or some other act of force, but to get him to pull over so that he could talk to them. There is no clearly established constitutional right not to be pursued. Finally, any reasonable officer could have believed lawful the pursuit at issue. Subsequent investigation by officers and experts found that there was no

fault the part of Officer SMITH and that the pursuit was proper up and through the very end. As Officer SMITH pursued the suspects he was careful to slow down at intersections and because of this was able to make turns without screeching his tires or losing control of his vehicle. Additionally, he maintained a distance of approximately 200 plus feet between his patrol vehicle and the fleeing motorcycle. These undisputed facts clearly indicate that Officer SMITH acted objectively reasonable in his pursuit and there are no facts to indicate that his conduct would shock anyone's conscience.

As for plaintiffs' Fourteenth Amendment claim, plaintiffs, as a matter of law, cannot identify any right that has been violated. As shown above, plaintiffs cannot prove any Fourteenth Amendment Civil Rights deprivation because, as a matter of law, they cannot show that Officer SMITH acted irrationally and arbitrarily, or that his conduct amounted to a brutal and inhumane abuse of official power literally shocking to the conscience. Although the legal standard regarding violation of the Fourteenth amendment was established at the time of this pursuit, defendants respectfully submit that standard was not clearly established in relation to what specific facts or circumstances involved in a pursuit would cause a reasonably prudent officer to know he was violating the Fourteenth Amendment rights of a fleeing suspect. Moreover, any reasonable officer acting under similar circumstances and with the knowledge possessed by Officer SMITH would have conducted themselves in precisely the same way that Officer SMITH conducted himself. There is no clearly established constitutional right to be free from police pursuit and a reasonable officer could

have believed that police pursuit was lawful in this case. Under the clear standard set forth in *Hunter v. Bryant* there is no question that Officer SMITH is shielded from liability based upon the good faith qualified immunity. Thus, summary judgment should be entered in favor of defendant Officer SMITH with respect to plaintiffs' claim for deprivation of life without due process of law on the grounds that the actions of Officer SMITH are protected by the good faith qualified immunity.

VI

PLAINTIFFS' CONSTITUTIONAL DEPRIVATIONS, IF ANY, WERE NOT CAUSED BY A POLICY, ORDINANCE, REGULATION OR DECISION OF THE DEFENDANTS

In order to establish liability against a municipality in an action brought pursuant to 42 USC Section 1983, a plaintiff must show either 1) an official policy, ordinance, regulation or decision which results in constitutional violations, or 2) conduct by officials or authorities evidencing an implicit authorization, approval or acquiescence in unconstitutional conduct. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). In addition, the allegedly unconstitutional action must have been taken pursuant to the purported policy, ordinance, regulation or decision and must represent:

> . . . A deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establish final policy with respect to the subject matter in question.

Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986), citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 (1985).

In light of the above, a section 1983 plaintiff, in order to impose liability on a local governmental entity,

> . . . must establish: 1) that he possessed a constitution [sic] right of which he was deprived; 2) that the municipality has a policy; 3) that this policy amount to deliberate indifference to plaintiff's constitutional rights; and 4) that the policy is the 'moving force behind the constitutional violation'.

Oviatt v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1991), quoting *City of Canton v. Harris*, 489 U.S. 378, 389-91 (1986).

In general, a single incident of unconstitutional conduct undertaken pursuant to a municipal policy is not sufficient by itself to give rise to liability on the part of the municipality. See *Oklahoma City v. Tuttle*, 471 U.S. 808. However, in certain circumstances, a municipality may be liable in an action pursuant to Section 1983 based upon a single unconstitutional decision or action, if made by a "decision maker [who] possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur v. City of Cincinnati*, 475 U.S. at 482. Moreover,

> The fact that a particular official – even a policy making official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion . . . the official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Id., at 481-83.

Even if an unconstitutional municipal policy if found to exist, liability against the municipality will not attack absent an underlying deprivation of a constitutional right. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). In the present case, plaintiffs seek to impose liability against defendants based on the following: 1) defendant SACRAMENTO COUNTY SHERIFF'S DEPARTMENT provided no specialized training to officers, including the individual defendant and 2) that other high speed chases have been undertaken by officers of the defendant police department with such frequency and with such little provocation that it can be fairly concluded that these defendants have a custom and practice of encouraging such chases for the sake of apprehending suspects, however minor the violation. Defendants SACRAMENTO COUNTY and SACRAMENTO COUNTY SHERIFF'S DEPARTMENT would respectfully submit that as a matter of law they cannot be liable pursuant to 42 USC Section 1983 and the Fourteenth Amendment based upon these allegations.

First, plaintiffs cannot prove that there is an underlying deprivation of a constitutional right. In *Britt v. Little Rock*, 721 F. Supp. and *Roach v. Fredericktown*, 693 F. Supp. the court stated that because the plaintiffs had suffered no constitutional injury at the hands of the individual officer – there was no Fourteenth Amendment or Fourth Amendment deprivation found – there could be no municipal liability. *Roach v. Fredericktown*, 693 F. Supp at 297; *Britt v. Little Rock*, 721 F. Supp. at 196; *City of Los Angeles v. Heller*, 475 U.S. 796. Such is the situation in the present case. Plaintiffs, as a matter of law, cannot prove

any of the defendants deprived them of their constitutional rights. As shown above, as a matter of law, plaintiffs cannot prove that any of the defendants deprived them of their Fourteenth Amendment or Fourth Amendment rights. Therefore, plaintiffs' second cause of action must fail as a matter of law.

However, if this court was to find that such a deprivation existed, defendants' motion for summary judgment must still be granted because plaintiffs cannot prove that the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT pursuit policy amounts to an indifference to constitutional rights or that the policy is the moving force behind the constitutional violation.

It is undisputed that the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT pursuit policy complies with and even exceeds California statutory standards. (See SCSD pursuit policy attached as Exhibit K; *see also* Deposition of Ronald Dart, page 9, line 25-page 10, line 7; deposition of D.P. Van Blaricom, page 86, line 16-page 87,1ine 16; deposition of Darrel Neufeld, page 80, line 26-page 81, line 3). It does not authorize, encourage or even suggest that officers violate the public's constitutional rights. The policy sets out specific language as to what procedures to follow when an officer engages in a high speed pursuit. Plaintiff's cannot point to any provision of this policy that amount to "deliberate indifference". To the contrary, plaintiffs' experts agree that SACRAMENTO COUNTY SHERIFF's DEPARTMENT pursuit policy is in full compliance with California statutory law. The policy does not permit offices to use deadly force to apprehend traffic violators. Rather, the policy provides, at most, that officers may pursue, that is, follow suspects. The policy

of following traffic offenders who refuse to obey an officer's directive to pull to the side of the road, does not infringe on anyone's constitutional rights.

Moreover, Officer SMITH received the standard training given to sheriff deputies and has received additional training in controlling high speed chases in advanced officer's school.

In *Cannon v. Taylor*, 782 F.2d, no such pursuit policy existed but the officer had received the adequate required training and the court held:

> The testimony and documentary evidence revealed that Officer Taylor received the standard policy academy training on operating his vehicle and on applicable state laws. Additionally, the state law on operating police vehicles over the speed limit was reproduced in the Columbus police manual. This court is unwilling to say that this training procedure is so inherently inadequate as to subject the City to liability in the absence of past officer misconduct resulting from lack of training.

Cannon v. Taylor, 782 F.2d at 951.

Therefore, the evidence in this case clearly supports a finding that Officer SMITH was not inadequately trained so as to constitute deliberate indifference as defined by the courts in *Cannon* and *City of Canton*.

As indicated above, plaintiffs also allege that defendants engaged in a custom and practice of encouraging chases for the sake of apprehending suspects, however minor the violation, at the expenses of the safety and well-being of the innocent members of the public.

On the issue of custom and pattern the court in *Cannon v. Taylor* the court stated:

> A municipality is not liable under Section 1983 for the negligence or gross negligence of its subordinate officials, including its Chief of Police, in failing to train the particular officer in question, in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.

Id. at 951.

There is no evidence in this case of any pattern of similar incidents, or that there is serious incompetence or misbehavior widespread throughout the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT. Inherent in any pursuit is some general risk of injury to the officer, the fleeing individual and possibly to the public.

Lastly, defendants respectfully submit that this case is nothing more than an isolated incident. Once again, there is no evidence of any other incidents of pursuits which may have involved violations of constitutional rights. Thus, this case clearly falls within the limitation on *Monell* type claims in *Oklahoma City v. Tuttle*, 471 U.S. 808.

Based on the foregoing, defendants would respectfully submit that summary judgment should be entered in favor of defendants COUNTY Of SACRAMENTO and SACRAMENTO COUNTY SHERIFF'S DEPARTMENT since there is no evidence from which a rational trier of

fact could conclude that plaintiffs have suffered any constitutional deprivation or that any such existing deprivation was caused by a constitutionally deficient municipal policy, ordinance, regulation or decision.

VII

DEFENDANTS ARE IMMUNE FROM A NEGLIGENCE ACTION PURSUANT TO CALIFORNIA GOVERNMENT CODE SECTION 845.8(b) AND CALIFORNIA VEHICLE CODE SECTIONS 17004 AND 17004.7

Government Code Section 845.8(b) provides that:

> Neither a public entity nor a public employee is liable for any injury caused by 1) an escaping or an escaped prisoner; 2) and escaping or escaped arrested person; or 3) a person resisting arrest.

A seemingly contradictory statute, Vehicle Code Section 17001, provides that:

> A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment.

The Court of Appeals in *Hooper v. City of Chula Vista* (1989) Cal.App.3d 442 reconciles this apparent contradiction. In *Hooper,* a 17 year old was killed while being chased by several City of Chula Vista police cars when he lost control of his motorcycle and slid under one of the pursing vehicles.

The court began its immunity analysis by quoting the Supreme Court in *Davidson v. City of Westminster* (1982) 32 Cal.3d 197.

> In sorting out the issues presented, it is important to consider first things first. Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunities.

Id. at 201-202.

Under statutory and case law, it is established that a driver of an emergency vehicle owes a general duty of care to drive with due regard for the safety of all persons using the highway so as not to impose upon others an unreasonable risk of harm. *Hooper v. City of Chula Vista,* 212 Cal.App.3d at 452.

Additionally, a police officer has a duty to the community to carry out his or her obligation to promote law abiding, orderly conduct, including, where necessary, to detain and arrest suspected perpetrator of offenses. *Id.* at 453. In reaching this conclusion, the court quoted *Reenders v. City of Ontario* (1977) 68 Cal.App.3d at 1045 which addressed the issue of whether police officers employed by the City of Ontario owed a duty to an injured plaintiff to refrain from pursing [sic] a lawbreaker who was already driving on public streets in a reckless and dangerous manner, in order to protect innocent third parties. (The court found no such duty existed).

> No moral blame attaches to City's conduct. Its police officers were attempting to apprehend and remove from the public streets a man who

had reportedly been drinking and driving a motorcycle in a reckless and dangerous manner and who was suspected of assault with a deadly weapon as well reckless driving and numerous other violations of the vehicle code.

As to the policy of preventing future harm, who can say whether greater harm would result from the imposition or non-imposition of a duty upon municipalities to refrain from pursing [sic] a lawbreaker already engaged in reckless and dangerous operation of a motor vehicle on the public streets. . . .

To impose a duty upon municipalities not to pursue a lawbreaker already engaged in dangerous conduct on the city streets would obviously cast a considerable burden on such city and have serious consequences to the community. One of the prime functions of government is to ensure law abiding, orderly conduct. What is a law enforcement officer to do faced with a situation such as that confronting the police officers in this case? Nothing? The imposition of a duty not to pursue would severely restrict necessary law enforcement conduct without any guarantee that serious injury to members of the public might not ensure anyway.

. . .

In our assessment, considerations of public policy preponderate against the imposition of a duty upon a municipality and police officers to refrain from pursuing a law breaker who is already operating a vehicle on the public streets and thoroughfares in a reckless and dangerous manner.

Reenders v. City of Ontario, 68 Cal.App.3d 1045, 1053-1054.

The court in *Hooper* then went on to say that there are compelling reasons to apply a broader rule of immunity to claims brought by the subject of a police pursuit, the suspect himself, or his heir, than those made up by innocent injured third parties. *Hooper v. City of Chula Vista*, 212 Cal.App.3d at 454.

> The policy reasons which some courts have cited to justify a reading of Section 845.8 that is limited by the provisions of Vehicle Code Section 17001 do not apply with equal force to the suspect who led the chase, as they do to the helpless third party struck down in its wake. A suspect leading the chase has the power to bring it to a halt by submitting to the authority of the officers to detain, question and/or arrest him, however unpleasant a submission might be to him. Having created the conditions which led to the danger of injury, a suspect should not be heard to complain of injuries incurred in the chase which he began. Moreover, even though some police negligence might take place during the pursuit, the immunity provided by Section 845.8 would nevertheless apply.
>
> This follows from the reasoning that immunity questions do not even arise until a duty of care and potential liability are found to otherwise exist.

Hooper v. City of Chula Vista, 212 Cal.App.3d at 454-455. *See also Davidson v. City of Westminster*, 32 Cal.3d at 201-203.

The court in *Hooper* also found that Government Code Section 845.8(b) provided absolute immunity for the discretionary ministerial act of continuing a chase once initiated. *Hooper v. City of Chula Vista*, 212 Cal.App.3d at

455. Therefore, defendants COUNTY OF SACRAMENTO, THE SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and OFFICER SMITH are immune from any claim of alleged negligence on the part of Officer SMITH based upon Government Code Section 845.8(b) and plaintiffs' third cause of action should therefore be dismissed as a matter of law.

Further, defendants are also immune from plaintiffs' claim of negligence pursuant to Vehicle Code Sections 17004 and 17004.7. Vehicle Code Section 17004 grants to a public employee immunity from liability for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call. *See also* Vehicle Code Section 17004. This statute explicitly provides Officer SMITH with immunity. Officer SMITH was in the immediate pursuit of actual violators of the law, while he was on duty in his patrol car. The statute is unambiguous and therefore as a matter of law, defendant Officer SMITH cannot be found liable for any cause of action alleging negligence. Thus, plaintiffs' third cause of action against Office SMITH should also be dismissed based on the immunity in Vehicle Code Section 17004.

Vehicle Code Section 17004.7 grants to a public entity employing peace officers which adopts a written policy on vehicular pursuits complying with statutory requirements immunity from for civil damages for personal injury to or death of any person or damage to property

resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been or believes he or she is being or has been, pursued by a peace officer employed by the public entity in a motor vehicle. *See also* Vehicle Code Section 17004.7. This statute explicitly provides the COUNTY OF SACRAMENTO and the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT with immunity. The general order of the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT complies with each and every statutory requirement, regardless of whether that policy is actually followed in a particular pursuit. *Kishida v. State* (1991) 229 Cal.App.3d 329. This determination is a question of law for the court. Vehicle Code Section 17004.7(d).

In discussing Vehicle Code Section 17004.7 the court in *Hooper* quoted the legislative history of Vehicle Code Section 17004.7 as it is very instructive.

> Supporters of the Senate Amendment argue that the potential of civil liability for accidents caused by fleeing suspects may deter peace officers from pursuits to the detriment of public safety. Also, in some instances, suspects have sought to recover from public entities for injuries incurred during a pursuit. This bill is intended to encourage public employers of peace officers to adopt express safe pursuit guidelines.
>
> According to the sponsors, it is hoped that the adoption of guidelines will 'reduce the frequency of accidents' and help remove fear of liability for suspect caused accidents from the decision of whether to undertake a pursuit. Public agencies which choose not to adopt a policy,

> would be subject to existing statutory and case law regarding the public agency's liability for injuries resulting from suspect pursuit.

Hooper v. City of Chula Vista, 212 Cal.App.3d at 456 quoting Assem. File Analysis of the Assem Office of Research, Concurrence in Sen. Amendments, Assem. Bill No. 1912 (1987-1988 reg. fess.) P.2, (italics added).

The defendants in *Hooper* were ultimately found not liable by reason of governmental immunity.

> All these things are going through [an officer's] mind; that there are substantial traffic violations being committed by this fleeing suspect and he has to consider the possibility of drugs or alcohol by the driver. So all of these things are going through his mind and he elects to continue the pursuit for two minutes. I don't think we want to second guess that decision. . . . All pursuits are dangerous, and this one was as safe as could be expected for a pursuit. Officer Hart drives for a living. That is all he does all day long is drive. No innocent people were hurt. There were no accidents caused along the way and the chase was relatively under control. Speaking of control, Thomas Hooper [the fleeing decedent] is the one who controlled the chase. . . .

Hooper v. City of Chula Vista, 212 Cal.App.3d at 457 (quoting the City's Trial Council Argument to the Jury).

Based on the foregoing, defendants COUNTY OF SACRAMENTO and the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT should be accorded the same conclusion. Defendant SMITH owed a duty to the community to promote law abiding, orderly conduct, including, where necessary, to pursue fleeing suspects. Brian

Willard and PHILIP LEWIS consciously chose to disregard the authority of Officer Stapp and SMITH. Officer Stapp lawfully requested that Willard and LEWIS pull over so that he could talk to them. LEWIS told Willard, "Fuck it! Let's get out of here!". So even though LEWIS was a passenger on the motorcycle, he instigated the chase. Brian Willard was slowing the motorcycle down until LEWIS told him to run. LEWIS can hardly be deemed an innocent third party. The decedent himself and Willard created the conditions which led to the danger of injury and death. Ultimately, LEWIS' death occurred because Willard lost control of the motorcycle. He lost control not because of some intentional or accidental force of Officer SMITH, but because Willard was traveling at an extremely high rate of speed with faulty tire pressure, and with a malfunctioning brake light. When he attempted to make an unsafe left turn. Furthermore, this is just the situation the legislature was contemplating when it enacted Vehicle Code Sections 17004 and 17004.7. It is undisputed the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT pursuit policy meets each and ever statutory requirement. It provides for: 1) supervisory control over the pursuit, if available; 2) procedures for designating the primary pursuit vehicle and for determining the total number of vehicles to be permitted to participate at one time in the pursuit; 3) for procedures for coordinating operations with other jurisdictions; and 4) guidelines for determining when the interests of public safety and effective law enforcement justify a vehicular pursuit and when a vehicular pursuit should not be initiated or should be terminated. (See SACRAMENTO COUNTY SHERIFF'S DEPARTMENT pursuit policy).

Since the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT pursuit policy meets these minimal requirements, as a matter of law, defendants COUNTY OF SACRAMENTO and SACRAMENTO COUNTY SHERIFF'S DEPARTMENT cannot be found liable as they must be accorded immunity pursuant to Vehicle Code Section 17004. *Kishida v. State* (1991) 229 Cal.App.3d 329. Therefore, plaintiffs' third cause of action against the COUNTY OF SACRAMENTO and the SACRAMENTO COUNTY SHERIFF's DEPARTMENT should also be dismissed based upon the immunity set forth in California Vehicle Code Section 17004.7.

VIII

PLAINTIFFS CANNOT AS A MATTER OF LAW SHOW THAT DEFENDANTS WERE THE PROXIMATE CAUSE OF PHILIP LEWIS' DEATH

Even assuming that defendant Officer SMITH was negligent under the circumstances, and that no immunity is accorded, the acts and conduct of Brian Willard and of PHILIP LEWIS were such that they broke the initial chain of causation and became the sole proximate cause of PHILIP LEWIS' death.

Other states have recognized and agreed with such reasoning in police pursuit cases. (See *Almeida v. Town of North Providence*, 468 A.2d 915 (1983); *Chambers v. Ideal Pure Milk*, 245 S.W.2d 589 (1952); *Roll v. Timberman*, 229 A.2d 281 (1967).

> Charged as they were with the obligation to enforce the law, the traffic laws included, they would have been derelict in their duty had they

> not pursued him. The police were performing their duty when Shearer, in gross violation of his duty to obey the speed laws, crashed into the milk wagon. To argue that the officers' pursuit caused Shearer to speed may be factually true, but is [sic] does not follow that the officers are liable at law for the results of Shearer's negligent speed. Police cannot be made insurers of the conduct of the culprits they chase. It is our conclusion that the action of the police was not the legal or proximate cause of the accident, and that the jury should have been instructed to find for the appellants.

Chambers v. Ideal Pure Milk, 245 S.W. 2d at 591.

When Officer Stapp ordered Willard and LEWIS to pull over, he and Officer SMITH could not reasonably foresee that its driver would speed away from him in a reckless manner and trigger an 65 mile an hour high speed chase down Orangevale Road that would result in PHILIP LEWIS' death.

Willard and LEWIS' flight from defendant Officer SMITH and Officer Stapp constituted a blatant disregard for both his own life and those of his passengers and other motorists which could not reasonably have been foreseen. Their thoughtless and wild conduct supervened whatever negligence the defendants may have committed and became the sole legal cause of PHILIP LEWIS' death. The exact same reasoning was used in *Almeida* where the Supreme Court of Rhoad [sic] Island absolved the officer and his employer from any liability for the death of a passenger in the fleeing vehicle. This reasoning should apply with more force to the present case because LEWIS

was not an innocent passenger as was the child in *Almeida*.

Based on the foregoing, defendants respectfully submit that summary judgment should also be entered in favor of defendants with respect to plaintiffs' third cause of action since there is no evidence from which a rational trier of fact could conclude that defendants' conduct was the proximate cause of plaintiff's death.

IX

CONCLUSION

For all the foregoing reasons, defendants respectfully request that the court enter summary judgment in its favor against plaintiffs with respect to all claims or in the alternative, a partial summary judgment with respect to each of the issues presented.

Dated: November 11, 1992.

Respectfully submitted,

PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By /s/ John R. Thacker
Terence J. Cassidy
John R. Thacker

Law Offices of
Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(916) 929-1481

Terence J. Cassidy - #99180
John R. Thacker - #137722

ATTORNEYS FOR: Defendants
COUNTY OF SACRAMENTO,
SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and
JAMES EVERETT SMITH

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS Personal Representative of the Estate of PHILIP LEWIS,

Plaintiffs,

v.

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100,

Defendants.
...../

No. Civ. S-91-505 GEB/GGH

DECLARATION OF JOHN THACKER IN SUPPORT OF MOTION FOR TOTAL OR PARTIAL SUMMARY JUDGMENT

DATE: December 7, 1992
TIME: 9:00 a.m.
DEPT: 6

I, John Thacker declare:

I am an attorney at law licensed to practice before all the courts of the State of California and the United States District Court for the Eastern District of California and am a member of the law firm of Porter, Scott, Weiberg & Delehant, attorneys of record for defendants herein.

Attached hereto as Exhibit A is a true and correct copy of Officer JAMES EVERETT SMITH's statement given to CHP Investigator Ronald Snider.

Attached hereto as Exhibit B is a true and correct copy of Officer Murray Stapp's statement given to CHP Investigator Roanld [sic] Snider.

Attached hereto as Exhibit C is a true and correct copy of relevant portions of the deposition of Officer JAMES E. SMITH taken on July 22, 1992.

Attached hereto as Exhibit D is a true and correct copy of Brian Willard's recorded statement given to CHP Investigator Ronald Snider.

Attached hereto as Exhibit E is a true and correct copy of Peter Berg's statement given to CHP Investigator Roanld [sic] Snider.

Attached hereto as Exhibit F is a true and correct copy of Jason Virga's recorded statement given to CHP Investigator Ronald Snider.

Attached hereto as Exhibit G is a true and correct copy of relevant portions of the deposition of Ronald Snider taken on July 22, 1992.

Attached hereto as Exhibit H is a true and correct copy of relevant portions of the deposition of D.P. Van Blaricom taken on October 2, 1992.

Attached hereto as Exhibit I is a true and correct copy of relevant portions of the deposition of Ronald C. Dart taken on October 14, 1992.

Attached hereto as Exhibit J is a true and correct copy of relevant portions of the deposition of Darrel W. Neufeld taken on September 22, 1992.

Attached hereto as Exhibit K is a true and correct copy of the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT's General Order/Pursuit Policy.

I declare under penalty of perjury that the foregoing is true and correct and if called to testify as a witness in this matter, i [sic] could testify competently as to the matters of fact contained herein based upon personal knowledge.

Executed on November 11, 1992 at Sacramento, California.

/s/ John Thacker
JOHN THACKER

EXHIBIT A

PREPARERS NAME: R. SNIDER
I.D. NUMBER: 8005
MONTH/DAY/YEAR: 5-22-90

State of California
NARRATIVE/SUPPLEMENTAL

DATE OF INCIDENT/OCCURRENCE: 5-22-90
TIME (2400): 2045
MCC NUMBER: 9250
OFFICER I.D.: 8005

[X] NARRATIVE
[X] COLLISION REPORT

STATEMENTS:

P-2 (SMITH): STATED IN ESSENCE THAT HE AND DEP. STAPP HAD RESPONDED TO A 415 P.C. FIGHT CALL AT 8:30 P.M. THIS WAS AT 9336 ORANGEVALE AVE., ORANGEVALE. THEY HANDLED THE CALL AND THEY HAD BOTH JUST GOT BACK INTO THEIR PATROL CARS AND WERE READY TO LEAVE. HE OBS. DEP. STAPP TURN ON HIS OVERHEAD EMERGENCY LIGHTS AND THEN PULL HIS UNIT IN A LITTLE. HE HEARD DEP. STAPP YELLING AT SOMEONE AND HE THEN OBS. A MOTORCYCLE WITH TWO SUBJ'S ON IT. THE MOTORCYCLE STARTED TO DRIVE BETWEEN THE 2 PATROL CARS AND THEN IT TOOK OFF ACCELERATING RAPIDLY E/B ON ORANGEVALE AVE. AT A HIGH RATE OF SPEED, TOWARD MAIN AVE. HE MADE A THREE POINT TURN AND ACCELERATED AFTER THE MOTORCYCLE. HE OBS. THE MOTORCYCLE WAS ALL OVER THE ROAD USING

THE E/B AND W/B LNS. HE OBS. THE MOTORCYCLE RUN THE STOP SIGN AT MAIN AVE. AND TURNING LEFT ONTO N/B MAIN AVE. HE ACTIVATED THE RED LIGHTS AND SIREN. THE MOTORCYCLE N/B ON MAIN AVE. WAS AT A HIGH RATE OF SPEED, USING BOTH THE N/B & S/B LNS. AT LEAST 2 CARS WHICH WERE S/B ON MAIN AVE. HAD TO SWERVE ONTO THE SHOULDER TO AVOID THE MOTORCYCLE. THE MOTORCYCLE TURNED LEFT ONTO CENTRAL AVE. AND AGAIN WAS AT A HIGH RATE OF SPEED. THE MOTORCYCLE WAS SWERVING USING THE E/B AND W/B LNS. THERE WAS NO OTHER TRAFFIC ON CENTRAL AVE. THE LIGHTS AND SIREN OF HIS PATROL VEH. WERE STILL ON. HE ESTIMATED HE WAS APPROX. 300 FT. OR MORE BEHIND THE MOTORCYCLE. HE STATED HE DID NOT KNOW THE SPEED OF THE MOTORCYCLE OR HIS OWN SPEED. THE MOTORCYCLE TURNED LEFT AND ACCELERATED S/B ON CHESTNUT AVE. THE MOTORCYCLE WENT OVER A CREST IN THE ROAD AND AS HE CAME OVER THE CREST, HE OBS. THE MOTORCYCLE TRYING TO MAKE A L/TURN ONTO ORANGEVALE AVE. AS THE MOTORCYCLE WAS MAKING ITS L/TURN, IT APPEARED TO JUST STOP. THE DRIVER WAS EITHER FALLING OFF OR BAILING OFF THE MOTORCYCLE IN THE DIRECTION OF ORANGEVALE AVE. THE PASSENGER APPEARED TO BE EITHER JUMPING BACK OR WAS THROWN BACK TOWARD THE W/SIDE OF CHESTNUT AVE. HE HAD STARTED TO BRAKE WHEN HE NOTICED THE MOTORCYCLE WAS SLOWING. HE CONTINUED TO BRAKE UNTIL HE OBS. THE MOTORCYCLE WAS STOPPED. HE LET OFF ON THE BRAKES

SOME AND WAS PULLING OFF THE R/SIDE OF THE ROAD. HE THEN OBSERVED A SPRAY OF BLOOD AND OBS. THE PASSENGER BOUNCING DOWN THE ROAD. HE FURTHER STATED HE NEVER SAW A BRAKE LIGHT FROM THE MOTORCYCLE COME ON DURING THE PURSUIT. HE STATED THAT VICTIM LEWIS WAS DEFINATELY [sic] THE PASSENGER ON THE MOTORCYCLE. HE STATED AFTER COLLISION, HE REQUESTED LIFE FLIGHT, ADVISED DISPATCH OF HIS PURSUIT AND CHECKED VICTIM LEWIS. HE STATED HE NEVER OBS. THE DRIVER AGAIN. HE FURTHER STATED HE WAS TRYING TO ADVISE HIS DISPATCH OF THE PURSUIT WHILE IT WAS GOING ON BUT HIS RADIO WAS ON CH.5 AND HIS DISPATCH WAS UNABLE TO COPY THAT CHANNEL.

EXHIBIT B

PREPARERS NAME: R. SNIDER
I.D. NUMBER: 8005
MONTH/DAY/YEAR: 5-22-90

State of California
NARRATIVE/SUPPLEMENTAL

DATE OF INCIDENT/OCCURRENCE: 5-22-90
TIME (2400): 2045
MCC NUMBER: 9250
OFFICER I.D.: 8005

[X] NARRATIVE
[X] COLLISION REPORT

STATEMENTS:
WIT. STAPP: STATED IN ESSENCE THAT HE AND P-2 HAD CLEARED A 415 P.C. CALL AT 9336 ORANGEVALE AVE. HE WAS BACK IN HIS PATROL VEH. WHEN HE HEARD A MOTORCYCLE REVING AND THEN OBS. THE MOTORCYCLE APPROACHING HIS LOCATION AT A HIGH SPEED E/B ON ORANGEVALE AVE. HE TURNED ON HIS OVERHEAD LIGHTS AND THE MOTORCYCLE SLOWED DOWN AND CONTINUED TOWARD HIS LOCATION. HE PULLED HIS CAR OUT IN AN ATTEMPT TO BLOCK THE PATH OF THE MOTORCYCLE. IT CONTINUED UP AND BTWN. HIS PATROL CAR AND P-2'S PATROL CAR. HE YELLED AT THE DRIVER TO PULL OVER SO THEY COULD TALK. HE HEARD ONE OF THE TWO GUYS ON THE MOTORCYCLE SAY "FUCK IT, LETS GET OUT OF HERE". THE MOTORCYCLE DROVE BTWN. THE TWO CARS AND ACCELERATED AWAY E/B AT A HIGH SPEED. HE STATED THE DRIVER AND

PASS. DID NOT HAVE HELMETS ON. HE STATED THE DRIVER HAD DARK HAIR AND WAS WEARING A DARK JACKET. HE STATED VICTIM LEWIS WAS DEFINATELY [sic] NOT THE DRIVER. P-2 WENT AFTER THE MOTORCYCLE WITH RED LIGHTS AND SIREN ON. HE FOLLOWED OBSERVING THE MOTORCYCLE AND P-2 BOTH GO N/B ON MAIN AVE. ON MAIN AVE., HE COULD OBS. BRAKE LIGHTS ON V-2 COME ON BUT DID NOT SEE ANY BRAKE LIGHTS OF THE MOTORCYCLE COME ON. HE OBS. BOTH VEH'S TURN W/B ON CENTRAL AVE. & THEN AGAIN OBS. BOTH VEH'S TURNING S/B ONTO CHESTNUT AVE. AT THAT POINT HE LOST VISUAL CONTACT WITH BOTH VEH'S UNTIL ARRIVING AT T.C. SCENE. HE STATED HE WAS DOING APPROX. 65 MPH. TRYING TO KEEP UP WITH THE TWO VEH'S. HE STATED HE NEVER SAW A BRAKE LIGHT FROM THE MOTORCYCLE COME ON.

EXHIBIT C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of Estate of PHILIP LEWIS, Plaintiffs, vs. COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants.	#Civ S-91-505 LKK/GGH

Wednesday, July 22nd, 1992

2:15 p.m.

DEPOSITION OF JAMES E. SMITH

DIANA J. KAYL, C.S.R. #2406

WESTERN REPORTERS
Certified Shorthand Reporters
8880 Cal Center Drive, Suite 180
Sacramento, CA 95826
Phone: 366-5600

APPEARANCES:

For the Plaintiffs:

KANANACK, MURGATROYD & BAUM
Attorneys at Law
12100 Wilshire Boulevard, Suite 650
Los Angeles, California 90025
By: Paul Hedlund, Esq.

For the Defendants:

PORTER, SCOTT, WEIBERG & DELEHANT
Attorneys at Law
350 University Avenue, Suite 200
Sacramento, California 95825
By: Terence J. Cassidy, Esq.

* * *

[p. 23] any point during this pursuit?

A Well, if you want me to place an answer, answer that proper, I could guarantee I was doing under 100 and over 30.

Q That's fine. So if someone were to testify that you were doing 80 miles an hour or so during the pursuit, that would be within those limits and you would have no information from your own knowledge to dispel that evidence?

MR. CASSIDY: That –

Q BY MR. HEDLUND: Correct?

MR. CASSIDY: – misstates his previous testify. So I'll object. He has already testified he was going less than 80 miles per hour.

Q BY MR. HEDLUND: Well, my understanding is now that you've estimated your speed to be under 100 and over 30, so that everything within that range is a possibility as far as you're concerned, correct?

MR. CASSIDY: You can answer the question but it still implicitly misstates his prior testimony.

THE WITNESS: I'm not going to answer that.

Q BY MR. HEDLUND: You're not going to answer that question?

A Correct.

MR. CASSIDY: I'll insert an objection for him as argumentative.

Q BY MR. HEDLUND: With respect to the estimate of your speed as under 100 and over 30, do I take it [p. 24] from that or should we take it from that that you may have been doing 90 at some point during the pursuit?

MR. CASSIDY: You can answer that.

THE WITNESS: It's doubtful.

Q BY MR. HEDLUND: You may have been doing 80 during the pursuit?

MR. CASSIDY: Go ahead and answer.

THE WITNESS: What?

MR. CASSIDY: You can answer.

THE WITNESS: There's always that possibility.

Q BY MR. HEDLUND: At some point, your pursuit ended, correct?

A Correct.

Q And at the time that your pursuit ended, you were off the road, correct?

A Correct.

Q You were on someone's lawn, correct?

A Correct.

Q Mr. Philip Martin Lewis was dead, correct?

MR. CASSIDY: It assumes facts not in evidence. I'll object to that.

MR. HEDLUND: You can answer it.

MR. CASSIDY: Do you know whether he was dead?

THE WITNESS: I didn't whether he was dead at the time my patrol car came to a stop.

Q BY MR. HEDLUND: When you first – all right. When you first, when was the first time you saw Mr. Philip Martin Lewis after the pursuit?

* * *

[p. 26] Q And when you got very close to him, did he appear to be dead?

A I don't go by appearance whether somebody's dead or not. He could have been unconscious at the time.

Q Was he bleeding?

A There was some blood, yes.

Q Was his body distorted?

A I really didn't pay much attention to the lower torso portions of the body.

Q Did he show any signs of life at that time?

A No movement, if that's what you want. Depends on what you want to call signs of life.

Q Well, blinking his eyes, having his mouth open.

A You can be asleep and not blink your eyes.

Q Did he show any signs of life that you detected at that point?

A He showed signs of lifelessness.

Q Lifelessness? And that was, when you got close enough to him to see his appearance lying motionless in the road, that was approximately how long after your car came to rest?

A Probably under, under 20 seconds.

Q How far were you in your car when it came to rest from the motionless body of Mr. Philip Martin Lewis lying in the road?

A An approximate guess, I would say 40 to 60 feet from him.

[p. 27] Q Did you exit your car and immediately travel that 40 to 60 feet to Mr. Lewis?

A Yes, I did.

Q And that took you about 20 seconds?

A Approximately. Well, I was calling it in on the radio at the time, too. So that took a few seconds, a matter of seconds to get to the body.

Q When you first took stock of the situation after exiting your automobile, after your automobile came to rest after the pursuit, was Mr. Brian Willard in the vicinity that you could detect?

A No, he was not. If you're talking, not knowing his name at the time, the driver of the vehicle –

Q Right.

A – was not there.

Q So when the pursuit was over, Mr. Lewis appeared to be lifeless lying in the road with blood having been discharged from his body on the road, your car was on someone's lawn off the roadway and Mr. Willard, although you didn't know his name at the time, as the driver of the motorcycle that you were attempting to pursue and capture, was gone, correct?

MR. CASSIDY: You can answer that.

THE WITNESS: He was gone.

Q BY MR. HEDLUND: Sir, I ask you, did this pursuit end satisfactorily to you?

MR. CASSIDY: Don't answer that. I'll object as argumentative.

* * *

[p. 29] MR. CASSIDY: Well –

Q BY MR. HEDLUND: What did you hope to accomplish by your pursuit of this motorcycle on or about May 22nd, 1990 at or about 8:45 p.m.?

MR. CASSIDY: You can answer that question.

THE WITNESS: What did I hope I would what, now?

MR. HEDLUND: Accomplish.

MR. CASSIDY: Have it read back. If you don't hear the question, please read it back.

(Record read as requested.)

THE WITNESS: What I hoped to accomplish was that the, to stop his erratic driving and possibly injuring somebody else such as other vehicles that were on the road due to his erratic driving on the wrong side of the street, heading in the wrong direction.

Q BY MR. HEDLUND: Did you intend any other result?

A Did I what?

Q Intend any other result.

MR. CASSIDY: Do you mean such as arrest or citation or –

MR. HEDLUND: Yes.

THE WITNESS: Well, a lot of it depends on the circumstances. If the vehicle would have pulled over properly at the time, could have been a citation, could have been an arrest.

* * *

[p. 32] MR. CASSIDY: Well, I'm going to object –

Q BY MR. HEDLUND: Correct?

MR. CASSIDY: – then. It's vague and ambiguous and it's asked and answered, if it's the same as

being pulled over. And he's already told you his intention was to pull him over. So if stop is the same as defined as pulled over, then there's no reason to ask it a second time.

MR. HEDLUND: Well, I have a reason.

MR. CASSIDY: Well, I suspect you do. But if I don't understand it, I can't allow him to answer because it's vague and ambiguous to me.

Q BY MR. HEDLUND: Part of your intention was not just to have the motorcycle pull over to the side of the road and keep going, correct? You wanted it to stop, too, correct?

A Correct.

Q And you wanted it to stop because you thought that it was endangering the public?

MR. CASSIDY: Object as vague and ambiguous as to time. At what point?

Q BY MR. HEDLUND: Do you ever think that the motorcycle during your pursuit was endangering the public?

A Yes, I did.

Q When did you think that the motorcycle was endangering the public?

A Approximately the time he turned northbound [p. 33] onto Main Avenue, failing to stop for the stop sign from Orangevale. Driving northbound in the southbound lane of Main Avenue, swerving over into the northbound lane, back into the southbound lane and partially into a

bike lane, and forcing, I believe it was two vehicles off to the shoulder of the road.

Q And you witnessed all of these events that you just depicted?

A Yes, I did.

Q And at that point, you became concerned that the motorcycle might endanger the public, correct?

A At that point?

Q Yes.

A Yes, I did.

Q How long after you began your pursuit was that point where you felt – strike that – where you became concerned that the motorcycle was endangering the public?

MR. CASSIDY: In terms of seconds?

BY MR. HEDLUND: Any way you want to give it.

MR. CASSIDY: Well, then, it's vague and ambiguous. If you're talking about time –

MR. HEDLUND: I'm talking about time.

MR. CASSIDY: Okay. Can you give him a best estimate as to time as to how long it was?

THE WITNESS: From which points to which points again?

MR. HEDLUND: After you started your pursuit

• • •

[p. 35] person.

MR. CASSIDY: Well, then pick one.

Q BY MR. HEDLUND: All right. Well, we'll give you both. Tell me when you first started to move your car, did you – strike that. You did move your car to, in this, the direction of the pursued vehicle prior to turning on your lights and siren?

A Yes, I did.

Q And how long after you first started to move your car towards the motorcycle in pursuit of it did you turn on your lights and siren?

A Do you want distance wise?

Q I don't, you can give it – what I'd like is time right now.

A Time? Just a matter of a couple seconds.

Q And how far had you traveled in those couple of seconds prior to turning on your lights and siren?

A Oh, I'm not really sure of the footage, but I'd probably say maybe 100 feet.

MR. CASSIDY: Can you say how many house lengths?

THE WITNESS: Hmm?

MR. CASSIDY: How many house lengths?

THE WITNESS: I don't know because there was no homes right in that general area.

MR. CASSIDY: Okay.

Q BY MR. HEDLUND: Before I ask this next question, let me make sure that I have all of the

• • •

[p. 43] night in question?

A From the start to the finish?

Q Start to the finish.

A Approximately a minute and 15, minute and 20 seconds.

Q Now, at the time that you began your pursuit, you did not look at the time, correct?

A Did I look at the time?

Q Yes.

A No, I did not.

Q And immediately when your vehicle came to rest, you did not note the time, correct?

A Correct.

Q And your approximation of a minute and 15 seconds to a minute and 20 seconds, then, is something that you calculated backwards to determine –

MR. CASSIDY: Do you understand what he means?

THE WITNESS: Yeah, I know what he means, or I know what he's getting at. I estimated the time. It was approximately a minute 15 seconds to a minute 20 seconds.

Q BY MR. HEDLUND: What I'm asking you is how did you arrive at that estimate of time? Did you work backwards from the distances –

A I don't know if it was really that or just, just my own approximation.

Q Do you think that you can approximate on a normal basis within five seconds over a minute and 15

* * *

[p. 47] Chestnut? Correct?

A I slowed down whether there was or was not a stop sign there.

Q I see. And the reason you slowed down was so you could make that corner, correct? Correct?

A So I could turn southbound Chestnut, correct.

Q Right. And you only slowed to that speed that you could make that turn without losing control of your car, correct?

A Say that again.

Q You only slowed to that speed necessary so that you wouldn't lose control of your car when you made your right-hand turn from Central to Chestnut?

A I was making a left-hand turn.

Q Was it – okay. You were making a left-hand turn from Central to Chestnut and you slowed your car only to that extent that was necessary so that you wouldn't lose control of your car, correct, during the car –

A Below that. I slowed down to where my tires did not squeal or screech or lose any control –

MR. CASSIDY: Your answer is a yes or no. Your answer is no.

THE WITNESS: Okay.

Q BY MR. HEDLUND: Can you estimate the speed that you were going when you made your left-hand turn through the intersection of Central and Chestnut?

A Approximate, 25 miles an hour, maybe.

[p. 48] Q When you made that turn from Central to Chestnut, how far away from the motorcycle were you, distance?

A Approximately 200 plus feet.

Q How far away from the – strike that.

There is a crest in the roadway, is there not, just before you or as you're proceeding southbound on Chestnut just before you get to Orangevale, correct?

A Correct.

Q Approximately how far from the intersection of Orangevale and Chestnut is the crest in the roadway?

MR. CASSIDY: Let's get some definition because it's vague and ambiguous as asked. But I think if we can set a point as to the very peak of the crest and either the north parallel or south parallel of the intersection, then, or the center of the intersection, but we need to know where those markings are.

Q BY MR. HEDLUND: Well, I don't think that the ten feet or so width of this intersection is going to make a

difference in the measurement. However, let's say, from the – what –

MR. CASSIDY: If you'll stipulate that we're not –

Q BY MR. HEDLUND: What would you, what would you like to measure it from? The center of the intersection?

MR. CASSIDY: Well, if you want to stipulate that you're not ever going to hold him to this

* * *

[p. 53] occupants?

A That's –

MR. CASSIDY: Object as vague and ambiguous.

THE WITNESS: No, that's incorrect.

Q BY MR. HEDLUND: When were you able to see the motorcycle below waist level with respect to the crest of Chestnut?

A Just prior, prior to reaching the crest. There was, or as I was approaching, coming on top of the crest, just about –

Q Is it true, then, that as you came on top of the crest, you saw the complete motorcycle, correct?

A Correct.

Q And at that point, you realized that the motorcycle was stopping or stopped?

A At that point is when it was, appeared to be stopping.

Q And immediately when you realized that this individual was, appeared to be stopping, you slammed on your brakes?

A I wouldn't say I slammed on my brakes at that point.

Q Okay. What would you say you did?

A At that point is when I observed the smoke coming from the tire of the motorcycle. And realizing that it appeared as if he were stopping and/or attempting a left-hand turn, unsafe left-hand turn onto Orangevale is what, when I applied my brakes [p. 54] quite heavily. I didn't as you phrased slam on the brakes.

Q Well, when you applied your brakes "quite heavily," you locked up all four wheels of your vehicle, didn't you?

A That's what the Highway Patrol report states, yes.

Q Do you have any reason to believe that that's not true?

A No, I don't.

MR. HEDLUND: Off the record.

(Off the record discussion.)

Q BY MR. HEDLUND: What did you first perceive that caused you to instigate this pursuit?

A Well, initially, my, there was another unit that observed the subjects on the motorcycle doing something. Motorcycle pulled between myself and the other unit. The other unit had activated his overhead emergency

lights, pulled in towards my unit in order to stop the motorcycle. And at that point, there was two subjects on the motorcycle.

I heard my, the partner in the other unit yell something. I couldn't hear what he said because my windows were up. And at that point, I looked over my shoulder and I observed two subjects on a motorcycle almost, by this time, they appeared to be either driving very slowly or almost walking the motorcycle, straddling the motorcycle, and between the two units. [p. 55] I turned my head, observed the two subjects that, they both looked at me at one time or another. And at that point they accelerated at a high rate of speed, fleeing from my partner's patrol car.

Q What did you – do you have an estimate of the high rate of speed that they started fleeing after they walked the bike between the two patrol cars?

A No, I don't.

Q Well, you've seemed to have no problem with the word high rate of speed or the phrase high rate of speed now. Do you have any estimate at all?

A No, I don't.

Q What do you mean by high rate of speed?

A Well, actually going up and beyond the speed limit at a fast acceleration.

Q When they accomplished this fast acceleration, did you see smoke come from the tires at all?

A No. I did not.

Q Do you have an estimate of the weight of the two people who were on the motorcycle at the time you first observed them?

A No, I do not.

Q Do you, to this day, can you give us an estimate of their weights?

A No.

Q Have you in the past – well, over the five years preceding this incident, had you engaged in pursuits of vehicles in excess of the posted speed.

* * *

[p. 66] you had no reason to believe that the motorcycle was stolen, correct?

A Not at that point, no.

Q Do you have any reason to believe today as we sit here that the motorcycle in question was stolen?

A Well, it turned out it was stolen. I didn't ever say it was stolen. I may have, maybe in the back of my mind, there's a possibility I thought it might have been stolen.

Q Do you recall entertaining the notion that the motorcycle in question in this incident on May 22, 1990 that you had a conscious question that this motorcycle may be stolen?

A Possibly at the end of the pursuit.

Q The policy that you're to follow when you're in pursuit is, as you put it, to notify dispatch of the pursuit and the general direction, correct?

A Notify dispatch – you asked my thoughts on it, not from the paperwork?

Q Yes, right.

A Was notifying dispatch and the direction of travel.

MR. CASSIDY: And I believe he also indicated –

THE WITNESS: Supervisor.

MR. CASSIDY: – get the supervisor involved.

Q BY MR. HEDLUND: Okay. Were you able to notify dispatch of this pursuit, the general direction and

* * *

[p. 69] Q Did you push down on the button again and make the same announcement?

A Not at that, not at that split second, no. It was a short time later.

Q How long a time later did you attempt the same thing?

A Time wise, I really couldn't tell you. But it was just as we turned, either just as or as, just after turning south down Chestnut Avenue, I attempted to advise dispatch again.

Q And on that occasion, did you make that announcement as to your car number and that you were in pursuit more than once or just once?

A Just once the first time, once the second time.

Q And when you let up on the button, no one answered?

A That's right.

Q And do you have information which leads you to understand why no one answered on both those occasions?

A Yes, I do.

Q What is that information?

A Do you want – I was on the channel five, which is a non dispatching channel through our main radio.

Q I'm sorry, you were on channel five?

A You want me to describe the channels to you?

MR. CASSIDY: No, don't describe the channels.

THE WITNESS: Oh, I'm sorry.

* * *

[p. 74] Q BY MR. HEDLUND: What exact danger did you feel that the motorcycle that you were pursuing posed to the public?

A Well, starting out with forcing two vehicles off onto the shoulder of the road is posing a hazard to the drivers. The driver of the motorcycle also posed a hazard to the passenger on the motorcycle.

Q By engaging in a pursuit, however, you were aware that you would also pose a hazard, correct?

A I don't know if I would say I would pose a hazard as much as the motorcycle would.

Q You were at many times during the pursuit traveling at an equal to or greater speed than the motorcycle, correct?

A I'd say possibly equal to.

Q And you were driving a couple thousand pound, four door automobile, correct?

A Yes, I was.

Q And they were on a two wheeled motorcycle, correct?

A Yes.

Q Did you ever obtain the license plate number of the motorcycle in question?

A Only at the end of the pursuit.

Q Did you attempt to identify the license plate during the pursuit at any time?

A No, I did not.

Q When you, at any time during the pursuit, did [p. 75] you intend to cause the death of Mr. Lewis?

A Absolutely not.

Q If knowing what you do now, that Mr. Lewis died as a result of the pursuit, would you do the same thing again?

MR. CASSIDY: No. Objection. That calls for speculation. Don't answer the question.

Q BY MR. HEDLUND: How many stop signs did you to your knowledge go through without stopping during the pursuit?

A I believe, if you're talking about a complete stop, I'd say one, possibly one.

Q Is that the possible east/west stop on Central?

A On, I believe there's a stop sign at Walnut and Central. I believe that's the, that's the one, because I really can't remember if there's one at Chestnut.

Q So you know that there's a stop sign at Walnut –

A Yes.

Q – and Central?

A I'm fairly positive there's one at Walnut and Central for east and west Central.

Q You're equally certain, are you not, that you did not stop for that stop sign?

A Not a complete stop, no.

Q What was the lowest speed you believe you came down to?

[p. 76] A Maybe 20, 30 miles an hour.

Q Is Walnut and Central between Main and Chestnut?

A Yes, it is.

Q Midway?

A I don't know about midway. It's in there somewhere.

Q How fast was the motorcycle going – did you see the motorcycle go through the stop sign at Walnut and Central?

A Yes, I did.

Q And how fast was the motorcycle going when it went through the stop sign –

A I'm not sure of the speed but he made no attempt to slow down at all.

MR. CASSIDY: Make sure you let him finish his question.

THE WITNESS: Oh, sorry.

MR. CASSIDY: That's all right.

Q BY MR. HEDLUND: It has never been your contention, correct, that a person should die for evading arrest, correct?

MR. CASSIDY: I'm going to object as vague and ambiguous, incomplete hypothetical. Instruct him not to answer.

Q BY MR. HEDLUND: You don't think the punishment for what occurred on this night should be the death of anyone, correct?

* * *

[p. 85] MR. CASSIDY: Why don't you use right, left? You now have east and west.

THE WITNESS: Okay.

MR. CASSIDY: I just want to make sure it's clear. Did you veer your car to the right or the left?

THE WITNESS: I veered the car to the right.

Q BY MR. HEDLUND: Did you feel your car impact anything after you went over the crest and before you came to rest?

A No, I did not.

Q But in fact, you had definitely hit some type of post, hadn't you, in somebody's lawn?

A Yes, I did.

Q Did you break it off?

A I believe so.

Q Was there a mailbox attached to it?

A I believe so.

Q But you didn't feel that?

A No, I did not.

Q And as you went by the intersection of Orangevale and Chestnut, did you see Mr. Lewis standing in front of your car?

A No, I did not.

Q Did you ever – well, strike that.

As you went by the intersection of Orangevale and Chestnut, you suddenly saw a spray of blood across the front of your car, didn't you?

[p. 86] A Yes, I did.

Q And you saw Mr. Lewis rolling down the street, correct?

A Yes, I did.

Q Would you describe what Mr. Lewis looked like as he was propelled down the street when you saw him?

MR. CASSIDY: At what point?

Q BY MR. HEDLUND: Well, I only see one reference in your, in the pages. Let me –

MR. CASSIDY: You want to take five?

(Interruption in proceedings.)

Q BY MR. HEDLUND: We're back on the record. I show you a document entitled "Driver's Report of Accident, Sacramento County Number 90-46390." Do you recognize that document?

A Yes.

Q Did you fill that document out?

A No, I did not.

Q Did you cause it to be filled out?

A Did I cause it to be filled out?

Q Yes.

A I believe so.

Q And who did you direct to fill that document out?

A I – I didn't direct anybody to fill it out.

Q Would you describe the procedure in which that document to the best of your recollection was filled out? How did it come to get the typing on it that's

* * *

[p. 88] MR. CASSIDY: For the officer involved in the pursuit –

Q BY MR. HEDLUND: Yes.

MR. CASSIDY: – or for there to be a pursuit report filled out?

Q BY MR. HEDLUND: For the officer involved in the pursuit.

A It's either the officer or his supervisor could fill it out. It's my understanding.

Q But in any event, you didn't fill out any such report?

A I don't believe I did, no.

Q As you came over the crest of Chestnut, just before Orangevale, did you see Mr. Lewis at any time?

A Did I see him at any time?

Q Yes.

A Yes, I did.

Q When you saw him at first, what was he doing?

A As I'm coming over the crest?

Q Yes.

A Approaching Orangevale?

Q Yes.

A At that point, what I saw was him either jumping or being forced off or ejected from the motorcycle.

Q Which way was he jumping or moving?

A He was headed from the rear of the – the motorcycle at this point was approximately facing [p. 89] Orangevale eastbound. He appeared to be jumping more or less up and towards the center of the street. The center of Chestnut.

Q So he was jumping back from the motorcycle –

A In an upwards and back.

Q – it appeared – upwards and back? And the direction of his travel then appeared to you to be westbound on Orangevale, correct?

A Pretty much, yes.

Q Pretty much westbound on Orangevale? What happened next?

A At that point, just, just prior to seeing him being, coming off the motorcycle, just prior to that, I was applying my brakes, pulling off towards the right away from the motorcycle. And I heard a, as I approached towards in the general vicinity of the motorcycle, I heard a loud, a loud thud noise, thumping noise. And then I observed the body propelling up into the air outside the left portion of my front windshield, at which time the body was propelled past the front end of my patrol unit, landed on the ground and rolled, I don't know, a few times.

Q And after you heard the thud, you also saw a spray of blood come across the front of your car, correct?

A I believe it was blood, yes.

Q And at that point, you realized, did you not, that your car had contacted Mr. Lewis?

* * *

[p. 97] with your automobile traveling at approximately how fast?

A I have no idea.

Q You heard a thud and you heard this thud over the sirens that you had on, correct?

A Yes, I did.

Q And it sounded to you like you hit something, didn't it?

A No, it did not.

Q What did the thud sound like?

A Sounded like something hitting the asphalt.

Q And immediately after you or as you passed the intersection of Orangevale and Chestnut, where you had seen Mr. Lewis alighting from the back of the motorcycle, and after hearing the thud, there is a blood spray across your windshield and you see Mr. Lewis' body propelled into the air and in front of your automobile, correct?

MR. CASSIDY: Objection, asked and answered. You can go ahead and answer it.

THE WITNESS: Yes.

Q BY MR. HEDLUND: Did you continue to watch Mr. Lewis as he was propelled down the road?

A How do you –

Q Did you continue to focus on him or did you look somewhere else?

A I looked to make sure I wasn't going to drive up into a house or something. But yeah, I watched him

* * *

[p. 104] was another unit there, also.

Q And when you went to look where the driver of the motorcycle had gone, did you see where he had gone?

A No, I did not.

Q There is a type of deadend not very far eastbound on Orangevale from the intersection of Chestnut and Orangevale. Correct?

A I believe so. Not a deadend.

Q Well, there are some boards there that indicate that the road terminates, does it, or does it go through?

A I don't believe it goes through.

Q Would you characterize the motorcycle in this incident as a dirt bike or a street bike?

A Be classified as a street bike.

Q Have there been any comments from the management of your department, the Sacramento County Sheriff's Department, concerning pursuits since this incident?

A Has there been any what, now?

Q Comments from the management of your department or the Sacramento County Sheriff's Department, concerning pursuits that you're aware of since this incident?

MR. CASSIDY: I'm going to object as vague and ambiguous as to comments. But you can go ahead and answer.

* * *

[p. 108] through our office or the Highway Patrol, is both, Brian Willard and Mr. Lewis were both on probation. I believe it was for auto thefts. And they were not, part of the probations were they were not supposed to be with one another. And I'm not sure whether it was Mr. Lewis or Mr. Willard, I'm not sure which one it was, apparently had warrants out for his arrest for failing to appear on a theft charge.

Q BY MR. HEDLUND: But you don't know of any warrants for the arrest of Mr. Lewis?

A No. Like I said, I'm not sure. I can't remember which one for sure had the warrant. But I was informed that they were both on probation and what part of the probation was they were not to be with one another.

Q Any other information that indicated, indicates to you presently that Mr. Lewis might have been attempting to evade arrest at the time?

A No.

MR. CASSIDY: Same objection. Go ahead.

THE WITNESS: Not that I'm aware of.

Q BY MR. HEDLUND: And with respect to Mr. Lewis alighting from the back of the motorcycle, you have no idea, correct, whether he was going to attempt to run or stay or what he was going to do, correct?

A I had no idea.

MR. CASSIDY: Alighting being either the jumping or being ejected off?

EXHIBIT D

PREPARERS NAME: R. SNIDER
I.D. NUMBER: 8005
MONTH/DAY/YEAR: 5-28-90

State of California
NARRATIVE/SUPPLEMENTAL

DATE OF INCIDENT/OCCURRENCE: 5-22-90
TIME (2400): 2045
MCC NUMBER: 9250
OFFICER I.D.: 8005
NUMBER: F129825090

[X] NARRATIVE
[X] COLLISION REPORT

STATEMENT: BRIAN WILLARD:

Willard was interviewed at the No. Sac. CHP office. Participating in the interview were Off. Minett #8216, Off. Phelps #8673, Off. Vinson #7903 and myself. At 1353 hrs., I advised Willard of his Rights Per Miranda. Willard advised he understood those rights and he waived those rights.

In narrative form and in response to questions, Willard stated in essence that he was the driver of the m.c. with Philip Lewis the passenger on the back. He stated Philip is not supposed to be seen with him per his probation officer. He went by two cops and Philip said to keep going so he did. When he got to Chestnut Ave. and Central Ave. he became aware that the patrol car was chasing him. He tried to turn left onto E/B Orangevale Ave. and the m.c. started to slide a little bit and thats when the cop hit them. He ran after the accident and

went to Dave Witts house. (he produced a note from Dave Witt, into evidence at No. Sac. CHP).

When he first encountered the two patrol cars on Orangevale Ave., one of the patrol cars turned on its emergency lights. One of the officers said something as he went by but he didn't know what. As he drove away, he didn't know if they were going to chase him, but he suspected that they would. He was driving in a manner to get away in case they did. He didn't know how fast he was going on Main Ave. but thought he got up to approx. 70 or 80 on Central Ave. He first obs. the P.C. was behind him when he turned onto Chestnut Ave. At that time he heard the siren. When he got down Chestnut Ave. a ways, Philip told him to just stop on Orangevale Ave. He said as he was braking, he kind of slid and then the cop hit them sideways and he saw Philip flying. He panicked and ran. He said he didn't lock up the tire until he was going to turn. He stated Orangevale Ave. is a dead end road and you can't go anywhere. He then stated you can probably get a m.c. thru the 2 to 2½ foot hole in the barrier. He did not know how close the patrol car was when he started to turn. Willard said the m.c. was going down on its left side but didn't know if the m.c. was all the way down or not when hit by patrol car. He said the m.c. was going to go down if hit or not hit by the patrol car. He felt an impact when the patrol car hit the m.c. He said the was probably going approx. 80 on Chestnut Ave. before he started to slow. He didn't start skidding until he started to turn. He remained on the m.c. until it came to a rest and Philip was thrown off when it got hit by patrol car. He said the m.c. was hit on the left rear side. Right when they got hit is when Philip was thrown off the m.c. He said he got

down to approx. 25 or 30 when he started to turn and the back brake locked up and thats why he was losing it. He did not know how far back the patrol car was on Chestnut Ave., he didn't hear the siren anymore. He said he had down shifted all the way to first gear to make the turn. When the m.c. went down, it stayed down. When the patrol car hit it, the m.c. spun around. This was his 3rd or 4th time to ride this m.c. He said the glass on the spdo. was not broken and there were only some scratches on the front crash bars. He said Philip got hit pretty hard by the patrol car and that just left of the center of front of patrol car hit Philip. Willard stated he did not know if the brake light worked or not. He stated he assumed that Philip got hurt.

This interview was tape recorded.

After the interview and prior to Willard being taken to the Sac. Co. Jail, he was shown a denim jacket which was found by wit. Anthony on the night of the accident. Willard I.D.'d the jacket as his.

EXHIBIT E

PREPARERS NAME: R. SNIDER
I.D. NUMBER: 8005
MONTH/DAY/YEAR: 5-29-90

State of California
NARRATIVE/SUPPLEMENTAL

DATE OF INCIDENT/OCCURRENCE: 5-22-90
TIME (2400): 2095
MCC NUMBER: 9250
OFFICER I.D.: 8005
NUMBER: F129825090

[X] NARRATIVE
[X] COLLISION REPORT

STATEMENT OF PETER BERG: WIT. #1

ON 5-24-90 AT 1100 HRS., I OBTAINED A STATEMENT FROM WIT. BERG BY PHONE. WIT. BERG STATED IN ESSENCE THE FOLLOWING

BERG WAS RIDING A BICYCLE S/B ON MAIN AVE. S/OF CENTRAL AVE. IN THE BIKE LN. ON THE W/SIDE OF THE ROAD. HE OBS. A MOTORCYCLE TRAVELING N/B ON MAIN AVE. AT APPROX. 45 TO 50 MPH. ENTIRELY ON THE WRONG SIDE OF THE ROAD TRAVELING N/B IN THE S/B BIKE LN. COMING DIRECTLY AT WIT. BERG. BERG STATED HE HAD TO STOP AND HE JUMPED OFF HIS BIKE TO PREVENT BEING HIT BY THE M.C. THE M.C. MISSED HIM BY APPROX. 1 TO 1 1/2 FT. THE HEADLIGHT OF THE M.C. WAS ON. THERE WERE TWO PEOPLE ON THE M.C. HE STATED HE COULD NOT I.D. DRIVER OR PASSENGER. HE OBS. THE PATROL CAR N/B APPROX

100 YDS. BEHIND THE M.C. ITS TOP LIGHTS WERE ON AND ITS SIREN WAS ON. IT WAS OBVIOUS TO BERG THAT THE M.C. WAS RUNNING FROM THE POLICE CAR. HE OBS. A 2ND PATROL CAR GO BY APPROX. 50 YDS. BEHIND THE FIRST. ITS LIGHTS ALSO ON. HE STATED THE M.C. APPEARED TO BE PULLING AWAY FROM THE 1ST PATROL CAR. HE NEVER HEARD T.C. HE WENT TO THE T.C. SCENE LATER & OBS. THE M.C. AT THAT LOCATION & THOUGHT IT WAS THE SAME M.C.

EXHIBIT F

PREPARERS NAME: R. SNIDER
I.D. NUMBER: 8005
MONTH/DAY/YEAR: 5-28-90

STATE OF CALIFORNIA
NARRATIVE/SUPPLEMENTAL

DATE OF INCIDENT/OCCURRENCE: 5-22-90
TIME (2400): 2045
MCC NUMBER: 9250
OFFICER I.D.: 8005
NUMBER: F129825090

[X] NARRATIVE
[X] COLLISION REPORT

STATEMENT OF WIT. JASON VIRGA:

Virga was interviewed by phone on 5-25-90 at 1055 hrs. Virga in essence related that he had obs. Brian Willard driving Philips m.c. at approx. 8 P.M. with Philip on the back. They returned to the Beacon station after a short ride. They talked about 20 min's and then they drove away with Philip driving. This was about 25 min's before he heard all the sirens. He stated that he had himself driven the m.c. one time before in his front yard. He said that everything on the m.c. was o.k., only previous damage was to the crash bar on left side. There were two turn signals on the front but none on the back. He stated that he knew that the brake light was on all the time when the m.c. was running. He thought it was because Brian and Philip had messed with the fuses. The three of them had talked about it but that Brian and Philip thought it was working properly. He said that Philip would let lots of

other people ride the m.c. He stated that both Philip and Brian smoke lots of pot, but didn't know if either had been smoking any on the day of the accident.

This interview was tape recorded but the recorder was defective.

EXHIBIT G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of Estate of PHILIP LEWIS, Plaintiffs, vs. COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants.	#Civ S-91-505 LKK/GGH

Wednesday, July 22nd, 1992

9:30 a.m.

DEPOSITION OF RONALD SNIDER

DIANA J. KAYL, C.S.R. #2406

WESTERN REPORTERS
Certified Shorthand Reporters
8880 Cal Center Drive, Suite 180
Sacramento, CA 95826
Phone: 366-5600

APPEARANCES:

For the Plaintiffs:

KANANACK, MURGATROYD & BAUM
Attorneys at Law
12100 Wilshire Boulevard, Suite 650
Los Angeles, California 90025
By: Paul Hedlund, Esq.

For the Defendants:

PORTER, SCOTT, WEIBERG & DELEHANT
Attorneys at Law
350 University Avenue, Suite 200
Sacramento, California 95825
By: Terence J. Cassidy, Esq.

[p. 4] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of Estate of PHILIP LEWIS, Plaintiffs, vs. COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants.	#Civ S-91-505 LKK/GGH

BE IT REMEMBERED that pursuant to Notice, and on Wednesday, the 22nd day of July, 1992, commencing at the hour of 9:30 a.m., thereof, at the offices of PORTER, SCOTT, WEIBERG & DELEHANT, 350 University Avenue, Sacramento, California, before me, DIANA KAYL, a Notary Public in and for the County of Sacramento, State of California, there personally appeared,

RONALD SNIDER

a witness in the above-entitled action, who, being by me first duly sworn, was thereupon examined and interrogated as a witness in said cause.

* * *

[p. 33] motorcycle?

A I think that's basically it as far as why I felt that the motorcycle and the patrol car did not make contact.

There was one part that I could not figure out, Officer Minett could not figure out and MAIT could not figure out, and that was a damage to the motorcycle which was the rear portion of the seat where a passenger would be seated. The left side of that was pushed down and to the left a little bit.

MR. HEDLUND: Objection to the extent that it includes hearsay opinion without foundation.

Q BY MR. CASSIDY: And as you sit here today, there is no, you don't have any explanation as to how that occurred?

A I have no explanation for how that damage to the seat occurred. But I'm absolutely sure beyond any doubt that I have that the car never made contact with the motorcycle. The motorcycle couldn't have physically ended up where it did had the motorcycle and car made contact with each other.

Q You're familiar with the, I take it, the term "legal intervention"?

A Yes.

Q What is that?

A Legal intervention is where someone is fleeing arrest and you have your red lights and siren on. And it gets to the point where the person is driving in [p. 34] such, the person being chased is driving in such a manner that he's a danger to himself or others. That if the speed gets down to a point where you, we can – I can't say what the policy of the sheriff's office is – but if you get down to a speed of approximately 30 miles per hour or less, if you have the opportunity to ram the person that's fleeing, then you do that. You don't do it if you're on a motorcycle chasing a car and you don't do it if you're in a car chasing a motorcycle. We don't.

Q Okay. In your opinion, did you observe any physical evidence or any circumstances arising out of this accident on May 22, 1990 that led you to believe that Officer Smith and his patrol unit exercised legal intervention to stop this motorcycle?

A No, absolutely not.

MR. HEDLUND: Objection, calls for speculation. No foundation.

Q BY MR. CASSIDY: Could you give me a description of your training background?

A I went through Highway Patrol Academy and started in July of 1972. I was a live-in academy, which consisted of four months training, six days a week.

During that training, part of the curriculum was accident investigation. We had approximately, or I had approximately 80 hours of accident investigation training, which, part of which included the

* * *

[p. 37] Q Where were the upper division units taken?

A They were taken from an extension course out of U.C. Santa Barbara, I believe it was. They were taken in Santa Cruz.

Q Do you expect to remain in the Sacramento substation for the CHP for the next year or so?

A Yes.

Q You don't expect any immediate transfers?

A Well, I went there to work five years and I have been there ten and I'll probably be there another ten, so. . . .

(Off the record discussion.)

Q BY MR. CASSIDY: In terms of your investigation, did you have occasion to inspect the motorcycle?

A Yes.

Q In what, specifically, in terms of the operating condition, were you able to check to see if it was operable or –

MR. HEDLUND: Objection, no foundation.

THE WITNESS: The motorcycle was checked. I looked at the motorcycle at the scene. And the one thing that I noted there was that the brake light, when the key was turned to the on position, the brake light was on all the time. I further examined the motorcycle at Hirst Auto Wreckers probably two to three days after the accident and observed the same thing about that as –

* * *

[p. 39] officer or what I would have or any other officer to displaying red light and siren would have as far as legal justification for the pursuit, I would say that the pursuit was appropriate. And there was nothing prior to the point where the motorcycle and the patrol car are traveling southbound on Chestnut Avenue approaching Orangevale Avenue, there is nothing up to that point, by, from talking to both Mr. Willard and Deputy Smith and the other witnesses that were contacted, during the route of the pursuit that would indicate to me that Deputy Smith should have broken off the pursuit.

MR. HEDLUND: Further –

THE WITNESS: If –

MR. HEDLUND: – objection on basis of hearsay and no foundation.

THE WITNESS: – if I would have been the person chasing Mr. Willard on that night under the conditions that I saw, I would have continued the pursuit. I would have had no reason at that point to break off the pursuit.

I think there's a moral obligation to, if at all possible, to apprehend violators. All it does by breaking off the pursuit, unless you have an imminent danger there more than normal in a pursuit, if you break it off, then that's just, you're going to have another pursuit the next time somebody gets behind you and then another one, another one, another one.

[p. 40] MR. HEDLUND: Further motion to strike as non-responsive to the question. And asked and answered.

Q BY MR. CASSIDY: I take it you've never had the opportunity to review the Sacramento County Sheriff's Department pursuit policy?

A No, I haven't. Although sheriff of Sacramento County used to be the commissioner of the Highway Patrol. I believe that their policy is somewhat consistent with the Highway Patrol's policy.

MR. HEDLUND: Objection, move to strike. No foundation. Non-responsive.

Q BY MR. CASSIDY: Apart from the brake light being on when the ignition key was in the on position, was there anything else that you noted to be defective in the motorcycle?

A Not that I recall right now. If I could find the page in here that, where the vehicle was inspected, I could better answer that.

MR. HEDLUND: I will interpose an objection on the basis of foundation and hearsay.

THE WITNESS: The, reviewing the report – and Officer Hans Spohr, and his ID is 9329, responded to Hirst Auto Wreckers to do a full inspection of the motorcycle and the police car – reviewing his report, everything with the motorcycle with the exception of the brake light appeared to be in good operating order, with the exception that the tire pressure in [p. 41] the tires were not properly inflated. The front tire, the front tire shows, on the tire itself shows the maximum inflation should be 32 pounds per square inch, and the rear, 40 pounds per square inch. The, when Officer Spohr inspected it on May 23rd, the following day, the front tire was inflated to 14 pounds per square inch and the rear tire had approximately 72 pounds per square inch. Which would, in my opinion, would greatly affect the stability of that motorcycle.

Q BY MR. CASSIDY: In what respect?

A The 14 pounds per square inch –

MR. HEDLUND: Objection, no foundation –

THE WITNESS: – in the front tire –

MR. HEDLUND: – and hearsay –

THE WITNESS: – to the point where the tire is going to start showing that, just by looking at it, you should be able to tell that you're way below what the air

pressure you should have. Seventy pounds per square inch in the rear tire is going to make it like a rock. It's going to make it extremely hard, which is going to affect the coefficient of friction between that rubber tire and the roadway, the asphalt.

Q BY MR. CASSIDY: And how would it affect it?

A The, actually, the coefficient on the front one would actually be higher because, it's just like at the race track, they use soft tires at the drag strips for more traction. And in this case, you have a real soft tire in the front which is not, where if proper

* * *

[p. 43] MR. HEDLUND: Objection, calls for a legal conclusion, hearsay, no foundation, and invades the trier of fact's ultimate determination of fact.

THE WITNESS: The cause of this accident in my opinion was ultimately Mr. Willard, Mr. Brian Willard's violating section 2800.3, which is evading arrest resulting in death or injury.

But the, as he's fleeing the red lights and siren, he goes over a rise in the roadway and starts downhill towards Orangevale Avenue, traveling southbound on Chestnut Avenue. As he goes over the top of that rise, he then starts applying his rear brake, and possibly some of his front brake, in an attempt to slow, decelerate rapidly so he can make a left turn onto Orangevale Avenue.

The brake light of the motorcycle was on all the time when the key's turned on. So there's no indication to the officer following that the motorcycle is braking based on the brake light. Because it's always on.

The motorcycle starts leaving smoke from the rear tire, but it's over the crest of the rise. So until the patrol car reaches that crest in the road where he can see the motorcycle, he has no indication at that point that the motorcycle has slowed.

And at that point, Officer Smith tried to slow, activating his brakes, locking them up. But if the motorcycle still would have continued instead of [p. 44] trying to make the left turn, the motorcycle would not have gone down and Mr. Lewis would have maintained, stayed on the back. But Mr. Willard made an unsafe turning movement in violation of 22107 of the Vehicle Code. And he was also in violation of 24603(f) of the Vehicle Code, which is the defective brake light.

Q BY MR. CASSIDY: What was the one right before that?

A 22107 of the Vehicle Code, which is making an unsafe turning movement. It's my opinion that if Mr. Willard would not have attempted to make that left turn, this accident never would have happen [sic]. At least not at that point. It may have happened somewhere else, but it wouldn't have happened there.

Q All right. And you ultimately concluded that Brian Willard –

MR. HEDLUND: Objection, leading.

Q BY MR. CASSIDY: – leading, all right. Did you conclude –

MR. HEDLUND: Did you ultimately conclude as I'm reading from this document that –

Q BY MR. CASSIDY: It's already an exhibit. Someone else can read it. Did you conclude that Brian Willard's attempt to make this left turn in an unsafe manner causing the motorcycle to go down also caused Mr. Lewis to be ejected from the motorcycle into the path of the patrol unit?

A It's my opinion that either ejected Mr. Lewis [p. 45] as the motorcycle went down or I think in my mind a better assumption is that, or it seems more realistic in what happened that Mr. Lewis decided it was time to get off the bike and that the bike had, the motorcycle had slowed to a speed and it was going down. And I think he put his left foot down on the ground and simply tried to step off the motorcycle. And I think in doing that, he ended up falling backwards. And at that point is when the patrol car came through that location.

MR. HEDLUND: Objection, based on hearsay and no foundation.

Q BY MR. CASSIDY: And you base the fact that Mr. Lewis attempted to step off on that brush skid mark that you said you believed was from his shoe?

A Yes.

MR. HEDLUND: Objection, no foundation.

Q BY MR. CASSIDY: Mr. Willard was charged with what violations in addition to the vehicle codes that you previously mentioned?

A He was charged with 192.1 of the Penal Code, which is manslaughter with gross negligence. And he was also charged with section 20001 of the Vehicle Code, which is felony hit and run.

MR. HEDLUND: Objection, irrelevant.

Q BY MR. CASSIDY: What was the nature of the felony hit and run?

A Mr. Willard, as soon as he, the motorcycle came [p. 46] to rest, he fled on foot. And if I remember correctly, he fled eastbound on Orangevale Avenue. Through witnesses and stuff, he, we later determined that he crossed a field and ended up at one house and then another house and then another house. But he hid from the victim of the accident. He did not assist the victim of the accident, Mr. Lewis. He was aware that Mr. Lewis had been ejected down the road or had ended up down the road. And it was his opinion that he was probably hurt, but he stated that he wasn't sure. But he offered no assistance to Mr. Lewis at all. He simply fled the scene and hid from law enforcement agencies working the investigation until the following day when we found him hiding in a tent, I believe, behind a residence. And the party in the residence called the Highway Patrol and advised that he was there.

Q Do you know the outcome of those criminal charges?

A No, I don't.

Q In your opinion, Mr. Lewis died entirely as a result of the actions of Mr. Willard?

A Absolutely.

MR. CASSIDY: That's all I have.

EXAMINATION BY MR. HEDLUND:

Q BY MR. HEDLUND: Objection, leading. You say that Mr. Willard was additionally involved in the accident for fleeing the scene, correct, at fault

* * *

PREPARERS NAME: R. SNIDER
I.D. NUMBER: 8005
MONTH/DAY/YEAR: 7-29-90

State of California
NARRATIVE/SUPPLEMENTAL

DATE OF INCIDENT/OCCURRENCE: 5-22-90
TIME (2400): 2045
MCC NUMBER: 9250
OFFICER I.D.: 8005
NUMBER: F1298-250-90

[X] NARRATIVE
[X] COLLISION REPORT

OPINIONS AND CONCLUSIONS:

V-2, an on duty emergency vehicle with emergency lights and siren activated, was in pursuit of V-1, a 1976 Honda motorcycle. The pursuit started in Orangevale Ave. W/O Main Ave. when witness #11, Deputy Stapp, attempted to stop V-1 by activating his patrol cars overhead emergency lights. V-1 drove between Deputy Stapp's patrol car and V-2 and then accelerated away E/B on Orangevale Ave. V-2 went in pursuit of V-1 and was followed by witness Stapp some distance to rear of V-2. V-1 drove at high speed N/B on Main Ave., using both the N/B and S/B lanes forcing at least two S/B vehicles to swerve off the roadway to avoid V-1. There was also a bicycle which was S/B in the bike lane on the W/side of the road, this bike was being ridden by witness #1 Peter Berg.

Witness Berg had to stop and jump off the bike to keep from being hit by V-1. V-1 continued to Central Ave. where it ran the stop sign turning left and accelerating W/B on Central Ave. V-1 ran the stop sign at Chestnut

Ave. and turned left onto Chestnut Ave., V-1 was now S/B on Chestnut Ave. at a high speed with V-2 still in pursuit with its lights and siren still on . V-1 was now S/B on Chestnut Ave. with V-2 to its rear. V-1 continued just over the crest of a hill, and then began to brake hard leaving a locked rear wheel skidmark.

The brake light of V-1 was defective, when the ignition key was in the on position, the brake light was activated. The brake light was on at all times during the pursuit. There was no warning to P-2 that V-1 was slowing. In addition to the defective brake light, V-1 was now going down a grade and V-2 was going up a grade on the other side of the crest of the hill. This restricted the ability of P-2 to observe that V-1 was changing speed rapidly. As V-1 was rapidly slowing, V-2 was still continuing S/B at approximately the same speed as V-1, prior to V-1's slowing. As V-2 neared the crest of the hill, P-2 was then able to observe the smoke coming from the rear tire of V-1, V-2 began locking up all four wheels of V-2. V-1 attempted to make a L/turn onto Orangevale Ave. Due to the excess speed of V-1, it was unable to negotiate the L/turn. The L/side of V-1 went down onto the roadway as it was sliding in a S/E direction across the S/B lane and into the N/B lane.

As V-1 went down on its L/side, the passenger on the rear of V-1 (victim Lewis), was ejected from the motorcycle and lifted in the air above the S/B lane as the motorcycle (V-1) continued into N/B lane. As V-1 slid into N/B lane, V-2 slid past in the S/B lane and the passenger (Lewis) was struck by the L/front of V-2. The impact threw victim Lewis in a south direction and after victim Lewis hit the road several times, he came to rest in the

N/B lane and S/B lane. V-2 continued south, then swerving to the right and leaving to road on the w/side and L/front of V-2 struck a 4 x 4 wood mail box post and then came to rest. V-1 continued in the same line (S/E direction) and came to rest in the N/B lane. P-1 was still on V-1 when it came to rest. P-1 immediately jumped up and fled scene, running E/B on Orangevale Ave.

Some witnesses indicated that V-2 actually struck V-1. There is damage to the rear portion of the motorcycle seat and to the back around the rear of seat. The fender under the seat was also dented inward. This damaged [sic] appears to be new damage and I can not explain how the motorcycle sustained this damaged [sic].

It would appear that V-2 did not make contact with V-1, either prior to going down or at any time after going down. If V-1 had been struck by V-2 causing damage to V-1, the impact would have changed the direction of V-1. Physical evidence on the roadway indicates V-1 went down on its L/side while turning left, and it then continued to a point where it should have gone if not affected by another vehicle. The impact both seen and heard, was when V-2 struck passenger Lewis, after Lewis was ejected from the motorcycle. Have V-1 been able to negotiate the L/turn without going down, victim Lewis would not have been thrown from the motorcycle, and thus would not have been struck by V-2.

POINTS OF IMPACT:

I/O unable to determine the first two order of events due to the possibilities of simultaneous initial collisions of the

motorcycle (V-1)/Williard [sic] (P-1) striking the ground. And Lewis (passenger (V-1) and Smith (V-2) colliding.

V-1 (Lewis) impact was in the general area, 7 ft. E/O the west station line established S/B Chestnut Ave. and 4 ft. N/O the N/prolongation station line of Orangevale Ave. P-1 (Lewis) received injuries at some point in time while his motorcycle made contact with the asphalt pavement as evidenced by scrape marks located on the roadway.

V-2 (Smith) and passenger V-1 (Lewis), appeared to have collided in the general area of 7 ft. E/O the west station line established S/B Chestnut Ave. and in the area 5 ft. S/O the N/prolongation station line of Orangevale Ave. area. This is an arbitrary location based in the left side skid marks of V-2. (Smith), end of scrape/skid marks of V-1 (Williard) [sic] and the first point of observed blood splatter location approximately 25 ft. S/O the N/prolongation line of Orangevale Ave. and 8 ft. E/O the W/station line S/B Chestnut Ave.

The 3rd impact was approximately 6 ft. E/O the W/station line S/B Chestnut Ave. and 35 ft. S/O the N/prolongation line of Orangevale Ave. This was established by the large volume of a coned [sic] shaped blood splatter which came from passenger V-1 (Lewis).

The 4th impact was approximately 6 ft. W/O the W/station line S/B Chestnut Ave. and 82 ft. S/O the N/prolongation line of Orangevale Ave. This was established by the broken post and its cement hole.

CAUSE:

P-1 at fault for traffic collision in violation of numerous sections prior to, during, and after the collision. P-1 in violation of section 2800.3 VC, evading arrest, causing death to his passenger. While evading arrest he was driving in a reckless manner with total disregard for the safety of other including not only victim Lewis, but also witness Berg who was almost hit while on his bicycle in Main Ave. P-1 in violation of section 24603(f) VC, defective brake light, which gave P-2 no warning of V-1's sudden hard braking. P-1 made an unsafe turn which resulted in V-1 going down and victim Lewis being ejected into the path of V-2. P-1 in violation of section 192.1 PC, manslaughter with gross negligence. P-1 observed victim Lewis after coming to rest, and knew victim Lewis was hurt. P-1 made no attempt to assist victim Lewis and instead, fled scene running. In violation of section 20001 VC, felony hit and run.

Due to the defective brake light of V-1, the crest of the hill just N/of the P.O.I., P-2 had no indication of V-1's braking, and P-2 did not contribute any negligence to the traffic collision or the death of victim Lewis. Victim Lewis died entirely as a result of the actions of P-1.

RECOMMENDATIONS:

None

PREPARERS NAME: R. SNIDER
I.D. NUMBER: 8005
MONTH/DAY/YEAR: 5-22-90

State of California
NARRATIVE/SUPPLEMENTAL

DATE OF INCIDENT/OCCURRENCE: 5-22-90
TIME (2400): 2045
MCC NUMBER: 9250
OFFICER I.D.: 8005

[X] NARRATIVE
[X] COLLISION REPORT

FACTS:

NOTIFICATION: RECEIVED CALL OF AN INJURY ACCIDENT, AMBULANCE AND LIFE FLIGHT RESPONDING AT 2048 HRS. ARRIVED AT SCENE AT 2100 HRS.

ALL THE FOLLOWING SPEEDS AND MEASUREMENTS ARE APPROXIMATIONS

ALL MEASUREMENTS TAKEN WITH 100 FT. STEEL TAPE MEASURE.

SCENE:

ROADWAY DESCRIPTION: CHESTNUT AVE. IS A N/S 2 LN. ASPHALT ROADWAY WITH 1 LN. IN EACH DIRECTION. THERE IS A SMALL CREST IN THE ROAD LOCATED APPROX. 200 FT. N/OF THE INTERSECTION OF ORANGEVALE AVE. THERE ARE NO STREET LIGHTS IN THE AREA. SEE FACTUAL DIAGRAM FOR FULL DESCRIPTION OF SCENE.

PARTIES:

P-1: V-1 WAS AT ITS POR LAYING ON ITS L/SIDE FACING IN A S/E DIRECTION. V-1 HAD MINOR DAMAGE WHICH CONSISTED OF THE REAR FENDER BEING BENT TOWARD THE R/SIDE. THE METAL BAR BEHIND THE SEAT WAS BENT SLIGHTLY TOWARD RIGHT. THE REAR PORTION OF THE SEAT WAS BENT DOWN SLIGHTLY. SCRAPES ON L/SIDE OF GAS TANK. SCRAPES ON L/SIDE OF CRASH BAR. P-1 WAS NOT_AT SCENE UPON CHP ARRIVAL.

P-2: V-2 HAD NO VISIBLE DAMAGE. THERE WAS BLOOD SPLATTERED ON THE L/FRONT OF THE VEH. AND ALSO ON HOOD AND WINDSHIELD. P-2 AT SCENE UPON CHP ARRIVAL.

BOTH VEH'S IMPOUNDED AS EVIDENCE AT HIRST AUTO WRECKERS FOR ADDITIONAL EXAMINATION.

INJURIES: SEE PG. #5 FOR VICTIM LEWIS. POSSIBLE INJURIES TO P-1 NOT KNOWN AT THIS TIME.

PHYSICAL EVIDENCE: SEE FACTUAL DIAGRAM FOR PHYSICAL EVIDENCE AT SCENE.

OTHER EVIDENCE: 1 DENIM JACKET RECOVERED BY WIT. BRETT ANTHONY. AT HIS RESIDENCE AT 6343 ALLANTE CT. ORANGEVALE, BOOKED INTO EVIDENCE AT NO. SAC. CHP OFFICE.

APPROX. 6 PIECES OF SHOE LACES FOUND AT SCENE. BOOKED INTO EVIDENCE AT NO. SAC. CHP OFFICE.

ALL CLOTHES FROM VICTIM LEWIS BOOKED INTO EVIDENCE AT NO. SAC. CHP OFFICE.

1 PINK SLIP & REGISTRATION CARD FOR LIC. #GU3192 NO. SAC. CHP

APPROX. 75 PHOTOS TAKEN AT SCENE BY MARK J. COULOMBE OF
GARY W. HARSH PHOTOGRAPHIC SERVICES
PO. BOX 1324
CARMICHAEL, CA 95609 481-7530

APPROX. 48 PHOTOS TAKEN AT SCENE BY DEP. DENNIS SCHMIDT #490, CRIME SCENE INVESTIGATOR.
711 G ST.
SAC, CA 95814 440-5287

HIT AND RUN:

DEP. STAPP DESCRIBED THE DRIVER OF V-1 AS HAVING DARK HAIR AND WEARING A DARK JACKET. HE ALSO ID'd VICTIM LEWIS AS NOT BEING THE DRIVER OF V-1 AT THE START OF THE PURSUIT.

WIT. HATCH OBS. P-1 BRIAN WILLARD DRIVING V-1 BY HIMSELF AT DUSK, APPROX. 20 TO 30 MIN'S BEFORE T.C.

P-2 SMITH COULD NOT I.D. P-1 BUT STATED VICTIM LEWIS WAS DEFINATELY [SIC] THE PASSENGER ON V-1.

WIT. VIRGA STATED THAT VICTIM LEWIS WAS WITH BRIAN WILLARD. HE STATED HE SAW P-1 BRIAN WILLARD DRIVING THE MOTORCYCLE WITH VICTIM LEWIS RIDING AS PASSENGER APPROX. 15 TO 20 MIN.'S PRIOR TO ALL THE SIRENS. HE AGAIN OBS. THEM STOP AT THE BEACON STATION AND AFTER

APPROX. 10 MIN'S THEY DROVE AWAY WITH PHILIP DRIVING.

WIT. PATTERSON: OBS. THE DRIVER OF V-1 RUN FROM THE SCENE AFTER T.C.

WIT. EHRINGER OBS. THE DRIVER OF V-1 RUN FROM THE SCENE AFTER T.C.

WIT. RYAN TAYLOR AT APPROX. 2300 HRS. OBS. P-1 BRIAN WILLARD TO ARRIVED [SIC] AT THEIR RESIDENCE & BOTH KNEES WERE "SCRUFFED".

WIT. SHAWN TAYLOR SAME AS RYAN TAYLOR
OTHER FACTS: P-1 BRIAN WILLARD HAS NO RECORD WITH DMV. OF HAVING A DRIVERS LICENSE. DMV. RECORDS SHOW AN INDEX NUMBER ONLY X8310425.

EXHIBIT H

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of PHILIP LEWIS, Plaintiffs, vs. COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants.	)	No. Civ. S-91-505 GEB/GGH COPY

Deposition Upon Oral Examination

of

D.P. VAN BLARICOM

12:00 P.M. – 4:30 P.M.

October 2, 1992

1325 Fourth Avenue, Suite 1300

Seattle, Washington

Mary M. Paradise

Court Reporter

APPEARANCES

FOR THE PLAINTIFF:

PAUL J. HEDLUND
Attorney at Law
Kananack, Murgatroyd & Baum
12100 Wilshire Boulevard
Suite 650
Los Angeles, CA 90025

FOR THE DEFENDANT:

TERENCE J. CASSIDY
Attorney at Law
Porter, Scott, Weiberg & Delehant
350 University Avenue
Suite 200
Sacramento, CA 95865

* * *

[p. 4] Whereupon,

DONALD P. VAN BLARICOM was sworn and testified as follows:

EXAMINATION

BY MR. CASSIDY:

Q. Please state your full name for the record and spell your last name.

A. Yes, sir. Donald Perry – that's P-e-r-r-y – Van Blaricom, B-l-a-r-i-c-o-m.

Q. And how old are you, sir?

A. 57.

Q. Are you presently employed?

A. Self-employed, yes.

Q. And what is your occupation?

A. I'm a retired police chief, but I am employed as a litigation consultant in cases alleging police misconduct, malpractice for plaintiff and defense and incorporated as such.

Q. And how long have you engaged in that occupation?

A. I started doing it in 1976, but I didn't really engage in it as a regular activity until approximately mid 1985.

Q. And as I understand it, you were the chief of police of Bellevue, Washington?

* * *

[p. 59] that right?

A. He says he was not. However, they passed within feet of him. I think he should have had some idea as to their age, but even if, you know, he was totally ignorant of their age, I would think you would most normally find young people riding motorcycles. But if he thought they were adults, it really doesn't change anything.

Q. Now, also, you would agree Officer Smith observed these individuals on the motorcycle pull away at a high rate of speed?

A. Correct, and immediately run a stop sign.

Q. So there are two infractions beyond the failure to yield to Officer Stapps which are observed by Officer Smith?

A. Correct.

Q. And those would give him, then, the right to at least attempt to pull over those two individuals?

A. Correct.

Q. Okay. And I assume you would agree that Officer Smith does not have a duty to refrain from pursuing those individuals?

* * *

[p. 86] into account in controlling his speed, and when somebody suddenly appeared that happened to be the passenger on the motorcycle, he ran him down. Now, I think he had adequate room to drive out of the – to drive out of the problem, but based on his skill, he was operating at an excessive speed.

Q. Does that cover all of the areas as to why you feel Officer Smith violated the general order in respect to the vehicles not posing an unreasonable risk of harm to others?

A. I think it also takes – has to take into account the fact that the order anticipates him discontinuing a chase when it's for minor – a minor violation.

Q. Now, would you agree that the general order regarding the use of vehicles, and particularly a pursuit, is appropriate?

A. Is it a good general order?

Q. Yes.

A. Yes, sir.

Q. Do you have any opinions or conclusions as to whether that general order meets the provisions of California Vehicle Code Section 17004.7?

[p. 87] MR. HEDLUND: Objection, calls for a legal conclusion.

A. I know what it is, but since – you know, since the Kishida decision, if the officer hadn't hit him, they would have been home free. But yes, to answer your question, yes, it does. Wait a second. Maybe it doesn't. Yes, Allied Agencies is here. Yes, it does.

Q. So in your opinion, the general order and particularly the provisions regarding pursuits promulgated by the Sacramento Sheriff's Department meets the provisions and criteria set forth in California Vehicle Code Section 17004.7?

MR. HEDLUND: Object to the form.

A. Sure. It was revised after it was passed, so that's obviously what they did.

BY MR. CASSIDY:

Q. Next category upon which you base your opinion that Officer Smith violated the general order.

A. Okay. Now we're on page five under B, "Initiating and/or Continuing Pursuits." And "when a suspect exhibits the intention of evading arrest," which is exactly what was done, "by using a vehicle to flee," which is what was

• • •

[p. 101] from the outset that it's the balance test, and that's what this – that's what this policy expects, and when the risk outweighs the need to apprehend, the pursuit is to be discontinued. They anticipate the suspect to escape. They say, "that's okay, we can get him another day."

Q. Anything else?

A. No, I don't think so.

Q. The next area of the general order that we discussed in terms of categories in which Officer Smith may have violated the general order is forcible stops.

A. I don't really think that's an issue here. I never have.

Q. The policy defines "legal intervention" as "the deliberate act of impacting a violator's vehicle with another vehicle to functionally damage or otherwise force the violator's vehicle to stop." And you would agree that the evidence does not support "legal intervention" as defined in this order in this case?

A. Not for Deputy Smith.

MR. HEDLUND: Objection. It calls for a legal conclusion.

BY MR. CASSIDY:

EXHIBIT I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of PHILIP LEWIS, Plaintiffs,	)	No. CIV-S-91-505LKK/GGH
versus	)	
COUNTY OF SACRAMENTO; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT; THE STATE OF CALIFORNIA; JAMES EVERETT SMITH; and DOES 1 - 100, Defendants.	)	

DEPOSITION OF

ROLAND C. DART III

SACRAMENTO, CALIFORNIA

OCTOBER 14, 1992

ATKINSON-BAKER AND ASSOCIATES, INC.
CERTIFIED SHORTHAND REPORTERS
1612 West Olive Avenue, Suite 203
Burbank, California 91506
(818) 566-8840

REPORTED BY: DENISE L. DOUCETTE, CSR, RPR, CM, CMR, CLVS
CSR License Number 5963

FILE NO: 9210668

APPEARANCES

FOR THE PLAINTIFF:

KANANACK, MURGATROYD & BAUM
BY: PAUL L. HEDLUND, ESQ.
12100 Wilshire Boulevard, Suite 650
Los Angeles, California 90025

FOR COUNTY OF SACRAMENTO; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT; and JAMES EVERETT SMITH:

PORTER, SCOTT & WEIBERG
BY: TERENCE J. CASSIDY, ESQ.
350 University Avenue, Suite 200
Sacramento, California 95825

• • •

[p. 5] ROLAND C. DART III,
having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. HEDLUND:

Q. Would you state and spell your name for the record, please.

A. Roland, R-o-l-a-n-d, middle initial C., Dart, D-a-r-t, III.

Q. Does that mean that there were a I and a II?

A. Right. Believe it or not, a IV.

Q. And there's a IV?

A. Yeah. That was my grandmother's doing, yes, but yeah, there is.

Q. Is the IV like later from you, or –

A. Yeah; my son.

Q. – are you starting backwards?

A. No; my son.

Q. Okay. Mr. Dart, are they the documents that were in your file that are sitting on the table here?

A. Yes, sir.

Q. Because you don't seem to have anything with you. That scared me a little bit. Do you have a CV?

MR. CASSIDY: Did the deposition notice

* * *

[p. 9] MR. HEDLUND: Okay. Perhaps the court reporter could read those four back. That would really help me.

(Record read.)

Q. BY MR. HEDLUND: Okay. And I take it that you examined the records to answer those questions?

A. Among other things.

Q. Okay. What other things did you examine the records for?

A. Well, I meant among other – you said records.

Q. I'm sorry. One of those misunderstandings. So you examined the records and other things to determine the answers to these four questions?

A. Yes, sir.

Q. And the fourth one – I'm not sure what that is, but it asked about officers' training?

A. (Nods head.)

Q. Was there anything more specific about the officers' training that you were being asked?

A. No.

Q. All right. I could hazard a guess as to the answers to each of those questions, but maybe you should tell me what your opinions were with regard to those four areas.

A. Well, my opinion is that the pursuit was [p. 10] conducted appropriately; that the department's general order does meet and probably exceeds the requirements of 17004 of the Vehicle Code; that there appears to be no attempt at legal intervention, nor did it occur; and the officer in question, Smith, meets the minimum standards required in the state of California for training as it relates to vehicle operation and hot pursuits.

MR. HEDLUND: Would you read the last part of that back? "As it relates –"

(Record read.)

Q. BY MR. HEDLUND: Are they all of the opinions that you have formed in this case?

A. In general, yes.

Q. Okay. Would you tell us each and every basis for your opinion that the pursuit in this case was appropriate and was conducted within the appropriate standards for police departments?

A. Officer Smith was on duty, working in the Patrol Division in the Orangevale area, completing a call, a domestic call – a 415, as they refer to it – on Orangevale Avenue. His partner, he hears, orders a motorcycle apparently with – not apparently, but with two occupants, to stop. They don't. He glances over his shoulder. They leave.

He turns on his red lights and siren. They

* * *

[p. 14] to be similar to that of my own department, other departments that I worked with, so I didn't pursue it.

Q. So you have no reason to believe that, in fact, that channel that Officer Smith was communicating on was, in fact, monitored; correct?

A. Could you repeat that?

Q. You have no reason to believe that the channel that Officer Smith was communicating on was monitored?

A. I have no reason to believe it was, no, I don't.

Q. And you feel that it was not?

A. That's correct.

Q. Okay. Now, you said that during the pursuit there was no loss of control by the pursuing officer, Officer Smith; correct?

A. That's my opinion, yes.

Q. Okay. You're aware, are you not, that at one point Officer Smith locked all four wheels to his automobile; correct?

A. Correct.

Q. And after that lockup, he didn't release the brakes until the car came to rest on someone's lawn after knocking over a mailbox; correct?

A. Yes, sir.

Q. And during that sliding, during that locked-up [p. 15] time, the vehicle struck and caused the death of Mr. Lewis; correct?

A. That's what the evidence indicates.

Q. Okay. And you would agree, would you not, that an automobile traveling 60 to 65 miles an hour when it starts a four-wheel locked skid in a situation such as this is out of control; is it not?

A. I wouldn't necessarily say that, no. I'm not an expert in accident or EVOC operations, but I don't believe that you can arbitrarily say that it was completely and totally out of control.

Q. It's important during the pursuit, is it not, in order to comply with proper police procedures, for the operator of the vehicle to remain in control of that vehicle; correct?

A. That's correct.

Q. You had a discussion with Officer Smith; correct?

A. Yes, sir.

Q. How much time did you spend discussing this case with Officer Smith?

A. I believe it was approximately an hour.

Q. And when did you do that?

A. I believe it was on August 24, if my recollection serves me.

* * *

EXHIBIT J

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatiave [sic] of the Estate of PHILIP LEWIS, Plaintiffs, vs. COUNTY OF SACRAMENTO, SACRAMENTO SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants.	)	Civ S-91-505 GEB/GGH

Tuesday, September 22nd, 1992

2:20 p.m.

DEPOSITION OF DARREL W. NEUFELD

DIANA J. KAYL, C.S.R. #2406

WESTERN REPORTERS
Certified Shorthand Reporters
8880 Cal Center Drive, Suite 180
Sacramento, CA 95826
Phone 366-5600

APPEARANCES:

For the Plaintiffs:

KANANACK, MURGATROYD & BAUM
Attorneys at Law
12100 Wilshire Boulevard, Suite 650
Los Angeles, California 90025
By: Paul J. Hedlund, Esq.

For the Defendants:

PORTER, SCOTT, WEIBERG & DELEHANT
Attorneys at Law
350 University Avenue, Suite 200
Sacramento, California 95825
By: Terence J. Cassidy, Esq.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatiave [sic] of the Estate of PHILIP LEWIS, Plaintiffs, vs. COUNTY OF SACRAMENTO, SACRAMENTO SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants.	Civ S-91-505 GEB/GGH

BE IT REMEMBERED that pursuant to Notice, and on Wednesday, the 22nd day of September, 1992, commencing at the hour of 2:20 p.m., thereof, at the offices of PORTER, SCOTT, WEIBERG & DELEHANT, 350 University Avenue, Sacramento, California, before me, DIANA KAYL, a Notary Public in and for the County of Sacramento, State of California, there personally appeared,

DARREL W. NEUFELD

a witness in the above-entitled action, who, being by me first duly sworn, was thereupon examined and interrogated as a witness in said cause.

* * *

[p. 80] number of photographs that you have taken independently on this.

Counsel, do you have any objection to Mr. Neufeld having copies of his photographs made and providing them to our office at our cost?

MR. HEDLUND: None whatsoever.

Q BY MR. CASSIDY: All right. If you could do that, please, Mr. Neufeld.

A You didn't copy the front cover of this?

Q No.

A Okay.

(Off the record discussion.)

Q BY MR. CASSIDY: Now, you also had a chance to review the general order regarding pursuit procedures from the Sacramento Sheriff's Department?

A Yes, I have.

Q All right. You were asked to determine whether it covered any aspects regarding pursuits of motorcycles?

A That's correct.

Q Were you asked to perform any other analysis or evaluation of that pursuit order?

A No. That was basically it.

Q All right. I take it you –

A And –

Q – you were not asked to determine whether that pursuit policy is in compliance with California Vehicle Code Section 17004.7?

[p. 81] A I wasn't asked to, but from my review of it and from my memory of that California Vehicle Code section, I believe it is in compliance.

Q Okay. Now, what were you, in terms of your being asked about that policy in conjunction with motorcycles, what is your opinion?

A There is no mention of motorcycles in the policy and procedures pursuit general order, which doesn't have a number on it, but it is, on the bottom, it's, 6/02, revised 1/89. There is no specific notations whatsoever on pursuit of motorcycles.

Q Why is that important to you?

A Well, in the pursuit of motorcycles, you have to consider other things rather than just four wheel vehicles. Motorcycles are less stable. There is no protection for the

rider and/or passenger. Therefore, in pursuits of motorcycles, a, in my opinion, a police officer must have additional care in responding to or pursuing motorcycles.

Q Well, in your opinion, did Officer Smith exercise that additional care in this case?

A No, sir.

Q Why not?

A Why not? Because he failed to consider, it appears that he failed to consider the instability of the motorcycle in his pursuit of the vehicle; i.e., the motorcycle.

Q How is that, how did he do that? What facts or

* * *

EXHIBIT K

SHERIFF'S DEPARTMENT
[SEAL]
COUNTY OF SACRAMENTO

GENERAL ORDER

OPERATION OF SHERIFF'S DEPARTMENT VEHICLES

THE PURPOSE OF THIS GENERAL ORDER IS TO SET FORTH POLICY GUIDELINES AND LIMITATIONS PERTAINING TO THE OPERATION OF SHERIFF'S VEHICLES.

I. SAFE OPERATION

A. EMPLOYEES SHALL OPERATE SHERIFF'S VEHICLES IN A SAFE MANNER CONSISTENT WITH EXISTING CONDITIONS.

B. IDEAS ON IMPROVING SAFETY WHILE OPERATING MOTOR VEHICLES SHOULD BE SUBMITTED TO THE EMPLOYEE'S IMMEDIATE SUPERVISOR AND/OR THE SHERIFF'S DEPARTMENT SAFETY COMMITTEE.

II. VEHICLE SECURITY PROCEDURES

A. FOR REASONS OF SECURITY AND PROTECTION OF THE SOPHISTICATED AND EXPENSIVE EQUIPMENT INSTALLED IN SHERIFF'S RADIO CARS, IT IS NECESSARY THAT THE UNIT OPERATOR LOCK THE VEHICLE WHENEVER IT IS LEFT UNATTENDED, EXCEPT WHEN HANDLING:

1. DISTURBANCES OF AN UNKNOWN NATURE WHEREIN THE OFFICER MIGHT HAVE NEED TO REENTER THE VEHICLE QUICKLY TO REQUEST COVER UNITS.

2. INSTANCES WHERE READY ACCESS TO THE SHOTGUN OR TO THE COMMUNICATIONS SYSTEM IS NECESSARY FOR OFFICER OR CITIZEN SAFETY.

3. CIRCUMSTANCES WHEREIN THE VEHICLE IS UNDER THE IMMEDIATE OBSERVATION AND RELATIVE PROTECTION OF THE OFFICER, SUCH AS IN VEHICLE STOPS.

III. DISPATCHING SHERIFF'S VEHICLES

A. CODE 3 IS THE ONLY AUTHORIZED CODE DESIGNATION ESTABLISHED TO GOVERN THE DISPATCHING OF POLICE VEHICLES:

CODE 3: DESIGNATES EMERGENCY ASSIGNMENTS CALLING FOR ALL PRACTICAL HASTE. A POLICE VEHICLE CAN BE OPERATED AS AN EMERGENCY VEHICLE WHEN RESPONDING TO A CODE 3 ASSIGNMENT.

B. THE DISPATCHING OF ALL SHERIFF'S VEHICLES SHALL ORIGINATE FROM OR BE CONTROLLED BY THE COMMUNICATIONS SECTION UNLESS OVERRIDDEN BY A FIELD SUPERVISOR.

1. COMMUNICATIONS SECTION PERSONNEL MAY DIRECT MEMBERS TO PERFORM POLICE TASKS ANYWHERE WITHIN THE COUNTY OF SACRAMENTO WITHOUT REGARD TO GEOGRAPHICAL LOCATION OR THE DIVISIONAL OR FUNCTIONAL ASSIGNMENT OF THE OFFICERS SO DIRECTED.

2. SPECIFIC CODE DESIGNATIONS SHALL NOT BE BROADCAST "IN THE BLIND".

COMMUNICATIONS SECTION PERSONNEL SHALL FIRST DETERMINE THE UNIT TO WHICH THE CALL WILL BE ASSIGNED AND THEN PROVIDE THE NATURE OF THE ASSIGNMENT AND THE CODE DESIGNATIONS.

EXAMPLES: "48B1" (48B1 ACKNOWLEDGES), "48B1, 245 SHOOTING LEW WILLIAMS, FULTON AND EL CAMINO, CODE 3."

"46B1" (46B1 ACKNOWLEDGES), 46B1, COVER 48B1 AT LEW WILLIAMS, FULTON AND EL CAMINO ON A 245 SHOOTING, RESPOND CODE 3.

3. THE CRITERIA FOR DESIGNATING CODE 3 RESPONSES SHALL BE AS FOLLOWS:

   (A) WHEN THE SITUATION INVOLVES AN IMMINENT POTENTIAL FOR SERIOUS INJURY TO PERSONS. FOR EXAMPLE:

   – THE REPORT OF A STRUCTURE FIRE AND IT IS KNOWN OR BELIEVED THAT PERSONS ARE INSIDE.

   – PERSONS REQUIRING ASSISTANCE BECAUSE OF ONE OF THE THREE FIRST AID EMERGENCIES, I.E. BREATHING, BLEEDING AND POISONING. (ATTEMPTED SUICIDE, INJURED PERSON).

   (B) THE PREVENTION OF A CRIME OF VIOLENCE OR A CRIME OF VIOLENCE IN PROGRESS.

   (C) A SERIOUS PUBLIC HAZARD. FOR EXAMPLE: – AIRPLANE CRASH – EXPLOSION – MAJOR FIRE – NATURAL DISASTER.

   (D) WHEN A FELONY HAS OCCURRED AND THE PERPETRATOR IS FLEEING THE SCENE AND A CODE 3 RESPONSE WILL ENHANCE THE LIKELIHOOD OF APPREHENSION.

IV. <u>OPERATIONS OF SHERIFF'S VEHICLES, EXCEPT WHEN IN IMMEDIATE PURSUIT</u>

A. EXCEPT WHEN IN IMMEDIATE PURSUIT, SHERIFF'S VEHICLES DISPATCHED THROUGH THE COMMUNICATIONS SECTION SHALL OPERATE IN CONFORMITY WITH THE FOLLOWING:

   1. OFFICERS MUST RESPOND TO ALL NON-EMERGENCY ASSIGNMENTS EXPEDITIOUSLY. WHEN PROCEEDING ON SUCH AN ASSIGNMENT WHERE THE DISPATCHER INDICATED "EXPEDITE", OFFICERS SHALL DO SO WITHOUT STOPPING TO HANDLE ANOTHER ROUTINE OR SUSPICIOUS MATTER. RED LIGHTS, SIRENS AND YELLOW LIGHT SHALL NOT BE USED AND ALL TRAFFIC REGULATIONS MUST BE COMPLIED WITH.

   CODE 3: A CODE 3 ASSIGNMENT IS AN EMERGENCY ASSIGNMENT CALLING FOR ALL PRACTICAL HASTE IN TRAVELING TO THE LOCATION OF THE INCIDENT

AND AUTHORIZES OFFICERS TO OPERATE THE SHERIFF'S VEHICLE WITH RED LIGHT ON AND SIREN ACTIVATED AS A WARNING TO OTHER DRIVERS AND PEDESTRIANS.

B. EXCEPT WHEN IN IMMEDIATE PURSUIT OF AN ACTUAL OR SUSPECTED VIOLATOR OF THE LAW, SHERIFF'S VEHICLES SHALL BE OPERATED CODE 3 ONLY WHEN UNITS ARE SPECIFICALLY DESIGNATED TO DO SO BY THE COMMUNICATIONS SECTION PERSONNEL, A FIELD SUPERVISOR, OR A COMMANDING OFFICER, WITH TWO EXCEPTIONS:

1. WHEN THE OFFICER IS IN THE PROCESS OF STOPPING ANOTHER VEHICLE, AND THE RED LIGHTS AND SIREN ARE USED TO BOTH SIGNAL THIS INTENTION AND EVOKE COMPLIANCE WITH CVC SECTION 21806, AND

2. WHEN AN OFFICER ENCOUNTERS AN ON-VIEW SITUATION WHICH COMES WITHIN THE CRITERIA SET IN PART II SECTION B 3, IN WHICH CASE HE MUST NOTIFY THE COMMUNICATION SECTION DISPATCHER THAT HE IS OPERATING HIS SHERIFF'S VEHICLE CODE 3.

C. OFFICERS RECEIVING CODE 3 ASSIGNMENTS MAY, BASED UPON INFORMATION NOT AVAILABLE TO THE COMMUNICATIONS SECTION PERSONNEL, DISCONTINUE THE CODE 3 RESPONSE STATUS. THE OFFICER SHALL NOTIFY COMMUNICATIONS SECTION PERSONNEL OF HIS CHANGED STATUS. SIMILARLY, SUPERIOR OFFICERS MAY DIRECT A DISCONTINUANCE OF A CODE 3 STATUS BY A SUBORDINATE OFFICER.

D. DRIVING RESTRICTIONS GOVERNING CODE 3 RESPONSE

1. OFFICERS SHALL, AT ALL TIMES, DRIVE DEFENSIVELY WITH DUE CONSIDERATION FOR THE SAFETY OF PERSON AND PROPERTY.

(A) CALIFORNIA VEHICLE CODE SECTION 21055 EXEMPTS THE DRIVER OF AN AUTHORIZED EMERGENCY VEHICLE FROM GENERAL RULES OF THE ROAD IF:

(1) THE VEHICLE IS BEING DRIVEN IN RESPONSE TO AN EMERGENCY CALL, OR

(2) THE VEHICLE IS ENGAGED IN RESCUE OPERATIONS, OR

(3) THE VEHICLE IS BEING USED IN THE IMMEDIATE PURSUIT OF AN ACTUAL OR SUSPECTED VIOLATOR OF THE LAW, OR

(4) THE VEHICLE IS RESPONDING TO A FIRE ALARM, AND

(5) THE DRIVER OF THE VEHICLE SOUNDS A SIREN AS MAY BE REASONABLY NECESSARY, AND THE VEHICLE DISPLAYS A LIGHTED RED LAMP VISIBLE FROM THE FRONT AS A WARNING TO OTHER DRIVERS AND PEDESTRIANS.

(B) ALL PERSONNEL SHALL BE FAMILIAR WITH AND OBSERVE THAT PART OF THE VEHICLE CODE SECTION

21056 WHICH STATES THAT EXEMPTION FROM CERTAIN PROVISIONS OF THE CODE " . . . DOES NOT RELIEVE THE DRIVER OF A VEHICLE FROM THE DUTY TO DRIVE WITH DUE REGARD FOR THE SAFETY OF ALL PERSONS USING THE HIGHWAY NOR PROTECT HIM FROM THE CONSEQUENCES OF AN ARBITRARY EXERCISE OF THE PRIVILEGE GRANTED . . . TO EMERGENCE VEHICLES BY VEHICLE CODE SECTION 21055."

(C) THE BASIC SPEED LAW OF THE STATE OF CALIFORNIA AS SET FORTH IN VEHICLE CODE SECTION 22350 SHALL BE OBSERVED AT ALL TIMES: "NO PERSON SHALL DRIVE A VEHICLE UPON A HIGHWAY AT A SPEED GREATER THAN IS REASONABLE OR PRUDENT HAVING DUE REGARD FOR WEATHER, VISIBILITY, THE TRAFFIC ON, AND THE SURFACE AND WIDTH OF THE HIGHWAY, AND IN NO EVENT AT A SPEED WHICH ENDANGERS THE SAFETY OF PERSONS OR PROPERTY."

2. AN OFFICER SHALL PROCEED THROUGH TRAFFIC CONTROL DEVICES SUCH AS BOULEVARD STOP SIGNS, TRAFFIC CONTROL SIGNALS AND RAILROAD GRADE CROSSING SIGNALS ONLY AFTER ASSURING HIMSELF THAT HE CAN DO SO WITH SAFETY. WHEN APPROACHING A BLIND, UNCONTROLLED INTERSECTION, A DRIVER SHALL ENTER SUCH INTERSECTION WITH EXTREME CAUTION.

3. CODE "3" ESCORT SHALL NOT BE PROVIDED. OFFICERS MAY TRANSPORT AN INJURED PERSON TO A HOSPITAL IF THE EMERGENCY IS OF SUCH GRAVITY THAT THERE IS NO TIME TO AWAIT THE DISPATCH AND ARRIVAL OF AN AMBULANCE.

V. PURSUITS

A. IT IS THE DUTY OF THE DRIVER OF AN AUTHORIZED EMERGENCY VEHICLE TO EXERCISE THAT AMOUNT OF CARE WHICH, UNDER ALL CIRCUMSTANCES, WOULD NOT IMPOSE AN UNREASONABLE RISK OF HARM UPON OTHERS.

ALTHOUGH VEHICLE CODE SECTION 17004 PROVIDES FOR CIVIL IMMUNITY FROM HARM CAUSED BY AUTHORIZED EMERGENCY VEHICLE OPERATION, IT SHOULD BE EMPHASIZED THAT THIS PROVISION DOES NOT SHIELD A DRIVER OFFICER AGAINST EITHER CIVIL, OR POSSIBLY EVEN CRIMINAL, LIABILITY FOR UNREASONABLE AND/OR ARBITRARY ACTS RESULTING IN HARM TO OTHERS.

B. INITIATING AND/OR CONTINUING PURSUITS:

WHEN A SUSPECT EXHIBITS THE INTENTION OF EVADING ARREST BY USING A VEHICLE TO FLEE; OR, WHEN A SUSPECTED LAW VIOLATOR REFUSES TO STOP, THE OFFICER MUST MAKE SOME BASIC, BUT IMPORTANT, DETERMINATIONS.

THE OFFICER MUST CONSIDER THE FOLLOWING:

1. DOES THE SERIOUSNESS OF THE OFFENSE WARRANT A CHASE AT SPEEDS IN EXCESS OF THE POSTED LIMIT?
2. DOES THE NEED FOR, AND POSSIBILITY OF APPREHENSION, JUSTIFY A PURSUIT UNDER THE EXISTING CONDITIONS?
3. DOES THE PURSUIT PRESENT UNREASONABLE HAZARDS TO LIFE AND PROPERTY?
4. IS THE PURSUIT REASONABLE IN REGARD TO ROAD, WEATHER, TRAFFIC, AND PEDESTRIAN CONDITIONS?
5. HAS THE SUSPECT BEEN IDENTIFIED SUFFICIENTLY TO ACCOMPLISH APPREHENSION AT A LATER TIME, AND CONTINUING THE PURSUIT WOULD ONLY SERVE TO INCREASE THE RISKS TO ALL INVOLVED?

OFFICERS SHOULD DISCONTINUE A PURSUIT WHEN, IN THEIR OPINION, THE RISK OF CONTINUING THE PURSUIT OUTWEIGHS THE DANGER OF PERMITTING THE SUSPECT TO ESCAPE.

GENERALLY, NO MORE THAN THREE SHERIFF'S UNITS WILL BE OPERATED CODE 3 IN A PURSUIT OPERATION (TWO PATROL UNITS AND ONE SUPERVISOR). THE NUMBER OF UNITS MAY BE ADJUSTED TO ACCOMMODATE A GIVEN SITUATION WITH SUPERVISORY APPROVAL.

C. IF A SINGLE POLICE VEHICLE FROM AN ALLIED AGENCY CONTINUES A PURSUIT INTO, OR INITIATES A PURSUIT WITHIN THE COUNTY OF SACRAMENTO, A SACRAMENTO

SHERIFF'S UNIT MAY JOIN IN THE PURSUIT. IF SUCH A PURSUIT IS BEING CONDUCTED BY TWO OR MORE ALLIED AGENCY UNITS, SSD UNITS SHALL NOT PARTICIPATE UNLESS SPECIFICALLY AUTHORIZED BY A SUPERVISOR.

IF INVOLVEMENT BY THE ALLIED AGENCY UNIT CONSTITUTES A HAZARD, OR CONDITION DESCRIBED IN PARAGRAPH V B, SSD UNITS SHALL DISCONTINUE THEIR PARTICIPATION.

D. FORCIBLE STOPS

LEGAL INTERVENTION IS THE DELIBERATE ACT OF IMPACTING A VIOLATOR'S VEHICLE WITH ANOTHER VEHICLE TO FUNCTIONALLY DAMAGE OR OTHERWISE FORCE THE VIOLATOR'S VEHICLE TO STOP.

THE DECISION TO ATTEMPT A FORCIBLE STOP BY MEANS OF LEGAL INTERVENTION IS DISAPPROVED UNLESS FACTS KNOWN TO THE OFFICER OR REASONABLY PERCEIVED BY THE OFFICER ALLOW HIM/HER TO FORMULATE AN AFFIRMATIVE RESPONSE TO 1, 2 AND 3 BELOW.

EXCEPTIONS:

1. AN OFFICER HAS REASON TO BELIEVE THAT THE CONTINUED MOVEMENT OF THE PURSUED VEHICLE WOULD PLACE OTHERS IN IMMINENT DANGER OF GREAT BODILY HARM OR DEATH, AND,
2. THE APPARENT RISK OF HARM, TO OTHER THAN THE OCCUPANT OF THE PURSUED VEHICLE, IS SO GREAT AS TO OUTWEIGH THE APPARENT RISK OF

HARM INVOLVED IN MAKING THE FORCIBLE STOP, AND,

3. ALL REASONABLE MEANS OF APPREHENSION HAVE BEEN CONSIDERED AND REJECTED AS IMPRACTICAL, SUCH AS; CONTINUE FOLLOWING, CALL FOR AIR SUPPORT, CALL FOR OTHER DEPARTMENTAL AND/OR ALLIED AGENCY ASSISTANCE.

WHENEVER POSSIBLE, A SUPERVISOR'S PERMISSION SHOULD BE OBTAINED PRIOR TO EXERCISING LEGAL INTERVENTION TACTICS. FOR SAFETY REASONS, LEGAL INTERVENTION SHOULD NOT BE ATTEMPTED AT SPEED GREATER THAN 35 MILES PER HOUR.

OFFICERS ARE NOT TO USE PATROL VEHICLES AS A BARRICADE/ROADBLOCK TO STOP A VEHICLE THAT IS BEING PURSUED, WITHOUT PRIOR APPROVAL OF A SUPERVISOR.

E. UNIT INITIATING PURSUIT – RESPONSIBILITIES

1. UPON COMMENCING A PURSUIT, THE INITIATING OFFICER SHALL IMMEDIATELY BROADCAST THE FOLLOWING:

(A) OFFICER'S UNIT DESIGNATION

(B) LOCATION AND DIRECTION OF TRAVEL

(C) VEHICLE DESCRIPTION

(D) REASON FOR PURSUIT

2. WHEN TIME AND CONDITIONS PERMIT THE INITIATING OFFICER SHALL ADDITIONALLY BROADCAST THE FOLLOWING:

(A) THE NUMBER OF OCCUPANTS IN THE PURSUED VEHICLE

(B) THE SPEED OF THE PURSUIT

(C) KNOWLEDGE OF PERTINENT FACTORS RELATING TO THE PURSUIT (I.E., WEAPONS, THREAT OF FORCE, UNUSUAL HAZARDS, ETC.)

3. THE INITIATING OFFICER SHALL VOLUNTARILY ABORT A PURSUIT WHEN, IN THE OFFICER'S OPINION AND IN ACCORDANCE WITH PARAGRAPH V. B, THE HAZARDS OF CONTINUING OUTWEIGH THE BENEFITS OF IMMEDIATE APPREHENSION.

4. AT THE CONCLUSION OF A PURSUIT, A DEPARTMENTAL "PURSUIT REPORT" SHALL BE COMPLETED AND SUBMITTED TO THE FIELD SUPERVISOR BY END OF WATCH. THIS REPORT WILL BE FORWARDED TO THE DIVISION COMMANDER WITHIN 24 HOURS.

F. SECONDARY UNIT – RESPONSIBILITIES

1. THE SECONDARY UNIT SHALL IMMEDIATELY BROADCAST THAT HE/SHE IS JOINING THE PURSUIT IN CODE 3 STATUS.

2. AS A GENERAL RULE, AND AT THE DISCRETION OF THE INITIATING OFFICER, THE SECONDARY UNIT WILL ASSUME COMMUNICATION RESPONSIBILITIES.

G. COMMUNICATIONS (DISPATCH) – RESPONSIBILITIES

1. RADIO SILENCE SHALL BE IMPOSED ON ALL UNITS NOT INVOLVED IN THE PURSUIT BY ACTIVATION OF THE ALERT BEEPER AND VOICE BROADCASTING THAT A UNIT IS IN PURSUIT.

2. A FIELD SUPERVISOR SHALL BE IMMEDIATELY NOTIFIED THAT A PURSUIT HAS BEEN INITIATED.

3. PERTINENT INFORMATION SHALL BE PROVIDED TO UNITS DIRECTLY INVOLVED IN THE PURSUIT.

4. ALLIED AGENCIES SHALL BE NOTIFIED IF POTENTIAL INVOLVEMENT CAN BE EXPECTED. IT SHALL BE SPECIFIED WHETHER ASSISTANCE IS REQUESTED OR NOTIFICATION IS FOR INFORMATIONAL PURPOSES ONLY.

5. UPON TERMINATION OF THE PURSUIT, THE DISPATCHER SHALL BROADCAST TO ALL UNITES AND ALLIED AGENCIES THAT THE PURSUIT HAS ENDED.

H. HELICOPTER – RESPONSIBILITIES

1. THE HELICOPTER CREW SHALL DIRECT VEHICLE DEPLOYMENT IMMEDIATELY UPON SIGHTING THE SUSPECT VEHICLE.

2. WHENEVER POSSIBLE, THE HELICOPTER CREW SHALL ASSUME COMMUNICATION RESPONSIBILITIES DURING THE PURSUIT AND DIRECT GROUND UNITS TO THE LOCATION OF THE SUSPECT VEHICLE. TO LESSEN THE POTENTIAL DANGER OF

VEHICLE COLLISIONS, PURSUING UNITS SHALL REDUCE SPEED SO AS TO INCREASE THE INTERVAL BETWEEN THE SUSPECT VEHICLE AND PURSUIT VEHICLES WHEN AIR SUPPORT IS IN PLACE.

I. FIELD SUPERVISOR – RESPONSIBILITIES

UPON BEING NOTIFIED OF THE PURSUIT, THE FIELD SUPERVISOR IS RESPONSIBLE FOR THE FOLLOWING:

1. DIRECTING A TERMINATION OF THE PURSUIT WHEN, IN HIS/HER OPINION AND PURSUANT TO THE PROVISIONS OF THIS ORDER, THE POTENTIAL HAZARDS/ DANGERS TO OFFICERS AND INNOCENT BYSTANDERS OUTWEIGH THE BENEFITS OF CONTINUING THE PURSUIT.

2. ENSURING THAT THE PURSUIT IS CONDUCTED IN ACCORDANCE WITH THE PROVISIONS OF THIS ORDER INCLUDING:

   (A) NO MORE THAN THE AUTHORIZED NUMBER OF UNITS ARE INVOLVED.

   (B) HELICOPTER ASSISTANCE HAS BEEN REQUESTED.

   (C) A DECISION IS MADE REGARDING THE USE OF A TACTICAL CHANNEL.

   (D) AFFECTED ALLIED AGENCIES HAVE BEEN NOTIFIED.

   (E) PROCEED TO THE TERMINATION POINT TO PROVIDE SUPERVISION AND TO GATHER INFORMATION FOR THE "PURSUIT REPORT".

   (F) SUBMIT THE "PURSUIT REPORT", VIA CHAIN-OF-COMMAND, TO THE

DIVISION COMMANDER DESCRIBING ALL CIRCUMSTANCES OF THE PURSUIT.

3. ALL COMMAND AND SUPERVISORY OFFICERS ARE CHARGED WITH GIVING PARTICULAR AND CONTINUING ATTENTION TO THE DRIVING BEHAVIOR OF THEIR SUBORDINATE PERSONNEL, ENSURING THAT THEY ADHERE TO SAFE, REASONABLE DRIVING METHODS, AND THAT THEY FOLLOW THE REGULATIONS CONTAINED WITHIN THIS ORDER. APPROPRIATE ACTION SHALL BE TAKEN BY SUPERIOR OFFICERS ON A CONTINUING BASIS TO ENSURE THAT IMPROPER DRIVING BEHAVIOR IS RECOGNIZED AND CORRECTED THROUGH COUNSELING, TRAINING OR DISCIPLINARY MEASURES.

SACRAMENTO COUNTY SHERIFF'S DEPARTMENT
PURSUIT REPORT

DATE _____ INITIAL LOCATION | DATE _____ ENDING LOCATION
TIME _____ _____ | TIME _____ _____

Agency Initiating Pursuit
☐ SSD ☐ CHP ☐ SPD ☐ Other: _____

Original Violation(s) _____

Allied agency req. SSD?
☐ yes ☐ no

Agency request. assist.
☐ CHP ☐ SPD ☐ other _____

Time Requested _____

No. of SSD units _____

SSD Unit Numbers _____

Helicopter Involved?
☐ SSD ☐ CHP ☐ none avail.

Name of SSD Super. notified _____

Supervisor involvement
☐ direct ☐ radio ☐ none

CSI requested
☐ yes ☐ no

No. of allied units involved:
CHP: ____ SPD: ____ Other: ____

Highest no. of units at one time _____

Length of Pursuit
Approximate miles: _____

Area
☐ res. ☐ frway ☐ bus. ☐ other

Max. spd attain. _____

Avg. speed _____

Traffic conditions
☐ lt ☐ mod ☐ hvy

Weather Cond.
☐ cl ☐ rn ☐ fog
☐ other _____

How terminated: ☐ Susp stopped voluntarily ☐ Legal intervention
☐ collision ☐ other _____ ☐ by officer ☐ by supervisor

SUSP. INFO.
Name _____ charge(s) _____
☐ in custody ☐ cited ☐ released ☐ evaded arrest.

SSD/Connected rpt numbers _____

Other suspects arrested
☐ yes ☐ no No._____

Rpt attached
☐ yes ☐ no

SUMMARY: _____

Initiating Officer's Name: _____ Badge No. _____

SUPERVISORY REVIEW

Damage to SSD Equip.
☐ yes ☐ no

Injury to SSD pers.
☐ yes ☐ no

Cal Osha
☐ yes ☐ no

Veh. acc. rpt.
☐ yes ☐ no

Action Taken _____

Final Rpt.
☐ yes ☐ no

Critique to follow
☐ yes ☐ no ☐ done

Supervisor signature _____
Lt. signature _____ Div. Comm. signature _____

7462 FORM 113 (6/88)

BEST AVAILABLE COPY

SACRAMENTO COUNTY SHERIFF'S DEPARTMENT
PURSUIT REPORT

DATE _____ TIME _____ INITIAL LOCATION _____

DATE _____ TIME _____ ENDING LOCATION _____

Agency Initiating Pursuit
☐ SSD ☐ CHP ☐ SPD ☐ Other: _____

Original Violation(s) _____

Allied agency req. SSD?
☐ yes ☐ no

Agency request. assist.
☐ CHP ☐ SPD ☐ other _____

Time Requested _____

No. of SSD units _____

SSD Unit Numbers _____

Helicopter Involved?
☐ SSD ☐ CHP ☐ none avail.

Name of SSD Super. notified _____

Supervisor involvement
☐ direct ☐ radio ☐ none

CSI requested
☐ yes ☐ no

No. of allied units involved:
CHP: ____ SPD: ____ Other: ____

Highest no. of units at one time _____

Length of Pursuit
Approximate miles: _____

Area
☐ res. ☐ frway ☐ bus. ☐ other

Max. spd attain. _____

Avg. speed _____

Traffic conditions
☐ lt ☐ mod ☐ hvy

Weather Cond.
☐ cl ☐ rn ☐ fog
☐ other _____

How terminated: ☐ Susp stopped voluntarily ☐ Legal intervention
☐ collision ☐ other _____ ☐ by officer ☐ by supervisor

SUSP. INFO.
Name _____ charge(s) _____
☐ in custody ☐ cited ☐ released ☐ evaded arrest.

SSD/Connected rpt numbers _____

Other suspects arrested
☐ yes ☐ no No._____

Rpt attached
☐ yes ☐ no

SUMMARY: _____

Initiating Officer's Name: _____ Badge No. _____

SUPERVISORY REVIEW

Damage to SSD Equip.
☐ yes ☐ no

Injury to SSD pers.
☐ yes ☐ no

Cal Osha
☐ yes ☐ no

Veh. acc. rpt.
☐ yes ☐ no

Action Taken _____

Final Rpt.
☐ yes ☐ no

Critique to follow
☐ yes ☐ no ☐ done

Supervisor signature _____
Lt. signature _____ Div. Comm. signature _____

7462 FORM 113 (6/88)

PROOF OF SERVICE BY MAIL
(c.c.p section 1013A[3])

I am over the age of 18 years and not a party to the within action; my business address is, and I am employed at Portere, Scott, Weiberg & Delehant, 350 University Avenue, Suite 200, Sacramento, CA 95825.

On 11/11/92 I served the following document(s) on the person(s) listed below by:

[X] Submitting a true copy, enclosed in a sealed envelope, to Airborn Express Services to be delivered via overnight delivery to the address shown below.

[ ] Placing a true copy, enclosed in a sealed envelope for collection and mailing on the date at the business address shown above following our ordinary business practices. I am readily familiar with this business' practice for collection and process of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

[ ] Hand delivering a copy of same to the address shown below.

DOCUMENT(S) SERVED:

NOTICE OF MOTION AND MOTION FOR
TOTAL OR PARTIAL SUMMARY JUDGMENT

ADDRESSED AS FOLLOWS:

Paul J. Hedlund, Esq.
KANANAK, MURGATROYD & BAUM
12100 Wilshire Blvd., Suite 650
Los Angeles, CA 90025
(310) 207-3233
FAX: (310) 820-7444

I declare under penalty of perjury the foregoing is true and correct. Executed at Sacramento, California, on 11/11/92 .

/s/ Cindy Grandinetti
Cindy Grandinetti

PROOF OF SERVICE BY MAIL
(c.c.p section 1013A[3])

I am over the age of 18 years and not a party to the within action; my business address is, and I am employed at Portere, Scott, Weiberg & Delehant, 350 University Avenue, Suite 200, Sacramento, CA 95825.

On 11/11/92 I served the following document(s) on the person(s) listed below by:

[ ] Submitting a true copy, enclosed in a sealed envelope, to Airborn Express Services to be delivered via overnight delivery to the address shown below.

[X] Placing a true copy, enclosed in a sealed envelope for collection and mailing on the date at the business address shown above following our ordinary business practices. I am readily familiar with this business' practice for collection and process of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for collection and

mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

[ ] Hand delivering a copy of same to the address shown below.

DOCUMENT(S) SERVED:

NOTICE OF MOTION AND MOTION FOR
TOTAL OR PARTIAL SUMMARY JUDGMENT

ADDRESSED AS FOLLOWS:

Paul J. Hedlund, Esq.
KANANAK, MURGATROYD & BAUM
12100 Wilshire Blvd., Suite 650
Los Angeles, CA 90025
(310) 207-3233
FAX: (310) 820-7444

I declare under penalty of perjury the foregoing is true and correct. Executed at Sacramento, California, on 11/11/ .

/s/ Cindy Grandinetti
Cindy Grandinetti

Law Offices Of
Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(916) 929-1481

Terence J. Cassidy – #99180
John R. Thacker – #137722

ATTORNEYS FOR: Defendants COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERETT SMITH

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS Personal Representative of the Estate of PHILIP LEWIS,

Plaintiffs,

v.

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100,

Defendants.

_____/

No. Civ. S-91-505 GEB/GGH

UNDISPUTED MATERIAL FACTS

FACTS:	**SUPPORTING EVIDENCE:**
1. On May 22, 1990, at approximately 8:30 p.m., Sacramento County Sheriff's Deputies JAMES EVERETT SMITH and Murray Stapp responded to a 415 Penal Code fight call at 9336 Orangevale Avenue in Orangevale in the course and scope of their employment.	Statements of Officers SMITH and Stapp given to CHP Investigating Officer Ronald Snider.
2. Officers SMITH and Stapp had just handled the above call, had both just got back into their patrol cars and were ready to leave when Officer Stapp heard a motorcycle revving and then observed the motorcycle approach his location at a high rate of speed.	Statements of Officers SMITH and Stapp given to CHP Investigating Officer Ronald Snider.
3. Officer Stapp turned on his overhead lights and the motorcycle slowed down and continued towards his location.	Statement of Officer Stapp; Deposition of JAMES SMITH, 54:18-19.
4. Officer Stapp pulled his car out into the street in an attempt to block the path of the motorcycle.	Statement of Officer Stapp; Deposition of JAMES SMITH, 54:19.

5. The motorcycle continued up in between Officer Stapp's patrol car and Officer SMITH'S patrol car.	Statements of Officers SMITH and Stapp; Deposition of JAMES SMITH, 54:17.
6. Officer Stapp yelled at the driver to pull over so that they could talk.	Statement of Officer Stapp; Deposition of JAMES SMITH, 54:22.
7. Officer Stapp heard one of the two guys on the motorcycle say, "Fuck it, let's get out of here."	Statement of Stapp; WILLARD'S recorded statement given to CHP Investigating Officer Ronald Snider.
8. The two motorcycle riders were not supposed to be seen together per "his" probation officer and PHILIP therefore told WILLARD to keep going when the officer told him to stop.	Statement of WILLARD; Deposition of JAMES SMITH, 108:1-8.
9. The motorcycle maneuvered between the two patrol cars and accelerated away at a high rate of speed.	Deposition of JAMES SMITH, 55:2-4; Statement of JAMES SMITH.
10. Neither of the individuals on the motorcycle was wearing a helmet.	Statement of Officers Stapp and SMITH.
11. Officer SMITH accelerated after the motorcycle with red lights and siren on.	Deposition of JAMES SMITH, 35:9-15.

12. From start to finish, the pursuit lasted approximately one minute and 15-20 seconds.	Deposition of JAMES SMITH, 43:19-21.
13. It was Officer SMITH'S decision to continue or terminate the pursuit.	Deposition of JAMES SMITH, 19:15-20.
14. At no time during the pursuit did Officer SMITH know the identity or age of the fleeing suspects, nor the license plate of the fleeing motorcycles [sic].	Deposition of JAMES SMITH, 19:26-28 and 74:25-27.
15. Officer SMITH estimates that his speed was less than 80 mph, but more than 30 mph.	Deposition of JAMES SMITH, 23:2-4.
16. During the pursuit, several cars had to swerve onto the shoulder of the road to avoid the speeding motorcycle.	Deposition of JAMES SMITH, 33:2-6.
17. By pursuing WILLARD and LEWIS, Officer SMITH hoped to stop their erratic driving, which included driving on the wrong side of the street, and thereby prevent inevitable injury to others.	Deposition of JAMES SMITH, 29:12.

18. Officer SMITH'S intention at the start of the pursuit was to get WILLARD and LEWIS to pull over and stop; that intention did not change at any time during the pursuit.	Deposition of JAMES SMITH, 29:12.
19. As Officer SMITH pursued the suspects, he was careful to slow down at intersections and because of this was able to make turns without screeching his tires or losing control of his vehicle.	
20. Officer SMITH maintained a distance of approximately 200 plus feet between his patrol vehicle and the fleeing motorcycle.	Deposition of JAMES SMITH, 48:1-4.
21. Per Sacramento County Sheriff's Department pursuit policy, Officer SMITH attempted to notify dispatch of this pursuit and the general direction, but was unable to do so.	Deposition of JAMES SMITH, 47:2-21 and 75:24 – 76:1.
22. Officer SMITH believes he tried to notify them twice and realized both times that he was unsuccessful.	Deposition of JAMES SMITH, 66:27.

23. Officer SMITH'S radio was on the car-to-car channel when he was trying to reach dispatch instead of the dispatch channel.	Deposition of JAMES SMITH, 69:18.
24. WILLARD and LEWIS were endangering the public by constantly swerving, using both oncoming and ongoing lanes.	Deposition of JAMES SMITH, 32:22.
25. Witness Peter Berg stated that while he was riding his bicycle that evening, he was forced to jump off his bicycle in order to avoid being hit by the motorcycle.	Peter Berg's statement given to CHP Investigating Officer Ronald Snider.
26. Berg stated that the motorcycle missed him by approximately 1 to 1½ feet.	Statement of Peter Berg given to CHP Investigating Officer Ronald Snider.
27. Berg stated that a patrol car with top lights and siren was following behind the motorcycle at approximately 100 yards.	Statement of Peter Berg given to CHP Investigating Officer Ronald Snider.
28. WILLARD and LEWIS went over a crest in the road and as Officer SMITH went over the crest, he observed the motorcycle trying to make a left turn.	Deposition of JAMES SMITH, 53:8-28.

29. As WILLARD was making a left turn, Officer SMITH saw smoke coming from its rear tire and it appeared that the motorcycle just stopped.	Deposition of JAMES SMITH, 53:16-17.
30. The driver was either falling off or bailing off the motorcycle.	Statement of Officer SMITH given to CHP Investigating Officer Ronald Snider.
31. The passenger appeared to be either jumping backward or was thrown backward.	Deposition of JAMES SMITH, 88:13 and 96:2.
32. The motorcycle brakes locked up when WILLARD was going to turn.	Statement of BRIAN WILLARD given to CHP Investigating Officer Ronald Snider.
33. The motorcycle was going down on its left side without any force or legal intervention from Officer SMITH.	Statement of BRIAN WILLARD given to CHP Investigating Officer Ronald Snider.
34. Officer SMITH started to brake heavily when he noticed the WILLARD motorcycle was slowing down and continued to brake until he observed WILLARD and LEWIS stopped.	Deposition of JAMES SMITH, 53:24 – 54:2.

35. Officer SMITH let off on his brakes some and began pulling off the right side of the road when he observed a spray of blood and observed the passenger, LEWIS, being propelled into the air in front of his patrol car and then saw him roll down the road.	Deposition of JAMES SMITH, 86:2-4 and 89:22; Statement of SMITH given to CHP Investigating Officer Ronald Snider.
36. Officers SMITH and Stapp never saw a brake light from the motorcycle come on during the pursuit.	Statements of Officers SMITH and Stapp given to CHP Investigating Officer Ronald Snider.
37. BRIAN WILLARD did not know if the brake light worked or not.	Statement of BRIAN WILLARD given to CHP Investigating Officer Ron Snider.
38. Witness Jason Virga stated that he knew the brake light was on all the time when the motorcycle was running.	Recorded statement of Jason Virga given to CHP Investigating Officer Ronald Snider.
39. Virga thought it was because WILLARD and LEWIS had messed with the fuses.	Recorded statement of Jason Virga given to CHP Investigating Officer Ronald Snider.

40. CHP Investigating Officer Ronald Snider tested the brake light and found that when the key was turned to the on position, the brake light was on all the time.	Deposition of Ronald Snider, 37:21-28.
41. Officer SMITH did not feel his car impact anything after he went over the crest and before he came to rest on someone's front lawn.	Deposition of JAMES SMITH, 24:11 and 85:8-11.
42. A thud sound that Officer SMITH heard over his siren did not sound like he hit something, but like something hitting asphalt.	Deposition of JAMES SMITH, 97:4-11.
43. When the pursuit ended, Officer SMITH was off the road and his patrol car was on someone's front law.	Deposition of JAMES SMITH, 24:11 and 85:8.
44. After approaching LEWIS, Officer SMITH observed no signs of life and he requested life-flight and advised dispatch of his pursuit.	Deposition of JAMES SMITH, 26:18; 27:507; and statement of SMITH given to CHP Investigating Officer Ronald Snider.

45. Officer SMITH has been a Sacramento County Sheriff's Deputy for approximately 20 years and has had training in controlling high speed chases in advanced officers' school.	Deposition of JAMES SMITH, 105:12-19; 106:10.
46. Officer SMITH never observed the driver of the motorcycle again as he had fled on foot.	Statement of Officer SMITH given to CHP Investigating Officer Ronald Snider; Deposition of JAMES SMITH, 104:2-5.
47. After extensive investigation, Officer Snider concluded that the patrol car never made contact with the motorcycle and there is no evidence of any legal intervention.	Deposition of Ronald Snider, 33:16-21 and 34:11-16; Deposition of D.P. Van Blaricon, 101:15-22.
48. There was no evidence to lead CHP Officer Snider to conclude that Officer Smith should have broken off the pursuit.	Deposition of Ronald Snider, 39:17-28.
49. Plaintiff's expert, D.P. Van Blaricon, agreed in deposition that after WILLARD and LEWIS committed two infractions beyond the failure to yield to Officer Stapp which was observed by Officer SMITH, Officer SMITH had the right to attempt to pull the two motorcyclists over.	Deposition of D.P. Van Blaricon, 59:10-22.

50. The tire pressure in the tires was not properly inflated, thus greatly affecting the stability of the motorcycle.	Deposition of Ronald Snider, 40:28 – 41:9.
51. LEWIS died entirely as a result of BRIAN WILLARD'S actions.	Deposition of Ronald Snider, 46:21-23.
52. BRIAN WILLARD was charged with the following: evading arrest resulting in death pursuant to Vehicle Code §2800.3; making an unsafe turning movement pursuant to Vehicle Code §22107; defective brake light pursuant to Vehicle Code §24603(f); felony hit and run pursuant to Vehicle Code §20001; and Penal Code §192.1, manslaughter with gross negligence.	Deposition of Ronald Snider, 43:4-7; 44:3-5; 44:5-6; 45:22-24; and 45:21-22.
53. The police pursuit was conducted appropriately; the Sacramento County Sheriff's Department general order does meet and properly exceed the requirements of Vehicle Code §17004; there was no legal intervention, and Officer SMITH'S training meets the minimum standards required in the State of California as it relates to vehicle operation and hot pursuits.	Deposition of Ronald C. Dart, III, 9:25 – 10:7; Deposition of D.P. Van Blaricon, 86:16 – 87:16; Deposition of Darrel W. Neufeld, 80:26 – 81:3.

54. Officer SMITH never lost control of his patrol car.	Deposition of Ronald C. Dart, III, 14:13 – 15:16.

Dated: November 11, 1992.

PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By /s/ Terence J. Cassidy
Terence J. Cassidy
John Thacker

PROOF OF SERVICE BY MAIL
(C.C.P SECTION 1013a[3])

I am over the age of 18 years and not a party to the within action; my business address is, and I am employed at Porter, Scott, Weiberg & Delehant, 350 University Avenue, Suite 200, Sacramento, CA 95825.

On 11/11/92 I served the following document(s) on the person(s) listed below by:

[X] Submitting a true copy, enclosed in a sealed envelope, to Airborn [sic] Express Services to be delivered via overnight delivery to the address shown below.

[ ] Placing a true copy, enclosed in a sealed envelope for collection and mailing on the date at the business address shown above following our ordinary business practices. I am readily familiar with this business' practice for collection and process of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

[ ] Hand delivering a copy of same to the address shown below.

DOCUMENT(S) SERVED:

STATEMENT OF UNDISPUTED MATERIAL FACTS

ADDRESSED AS FOLLOWS:

Paul J. Hedlund, Esq.
KANANACK, MURGATROYD & BAUM
12100 Wilshire Blvd., Suite 650
Los Angeles, CA 90025
(310) 207-3233
FAX: (310) 820-7444

I declare under penalty of perjury the foregoing is true and correct. Executed at Sacramento, California, on 11/11/92 .

/s/ Cindy Grandinetti
Cindy Grandinetti

Paul J. Hedlund, Esq.
Kananack, Murgatroyd & Baum
12100 Wilshire Boulevard, Suite 650
Los Angeles, California 90025
(310) 207-3233

ATTORNEYS FOR: Plaintiffs
TERI & THOMAS LEWIS, Personal Representatives
of the Estate of PHILIP LEWIS.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of Estate of PHILIP LEWIS, Plaintiffs, vs COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants.	)	No. Civ. S-91-505 LKK/GGH **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DECLARATIONS OF PAUL J. HEDLUND AND DARREL NEUFELD AND AFFIDAVIT OF VAN BLARICOM; SEPARATE STATEMENT OF DISPUTED AND ADDITIONAL FACTS**

MEMORANDUM BY PLAINTIFFS IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT BY DEFENDANTS

Comes now plaintiffs, Teri Lewis and Thomas Lewis, and oppose the Motion for Summary Judgment by Defendants as follows:

Table of Contents

I. INTRODUCTION..... 2

II. SUMMARY JUDGMENT MUST BE DENIED SINCE DECEDENT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS IN VIOLATION OF 42 U.S.C. 1983..... 4

III. SUMMARY JUDGMENT MUST BE DENIED BECAUSE THE DECEDENT WAS SUBJECTED TO EXCESSIVE FORCE DURING A SEIZURE IN VIOLATION OF 42 U.S.C. 1983 7

IV. SUMMARY JUDGMENT MUST BE DENIED BECAUSE PLAINTIFFS CAN SHOW DEFENDANTS SACRAMENTO COUNTY AND SACRAMENTO COUNTY SHERIFF'S DEPARTMENT'S FAILURE TO TRAIN ITS OFFICERS IN HIGH-SPEED PURSUITS CONSTITUTED RECKLESS DISREGARD OR DELIBERATE INDIFFERENCE FOR DECEDENT'S CONSTITUTIONAL RIGHTS..... 11

V. SUMMARY JUDGMENT MUST BE DENIED BECAUSE OFFICER SMITH CANNOT BE ACCORDED GOOD FAITH QUALIFIED IMMUNITY 12

VI. DEFENDANTS ARE NOT IMMUNE FROM LIABILITY UNDER GOVERNMENT CODE §845.8(b) OR VEHICLE CODE §§ 17001.4 OR 17004 15

VII. DEFENDANTS WERE AN OBVIOUS PROXIMATE CAUSE OF THE DEATH OF PHILIP LEWIS..... 21

VIII. SUMMARY 21

Table of Authorities

CASES

Brower v. County of Inyo, 489 U.S. 593 (1989) 7-9

Bummett v. County of Sacramento, (1978), 21 Cal.3d 880, 883-884; 148 Cal.Rptr. 361, 582 P.2d 952 ...16, 17

City of Sacramento v. Superior Court, (1982) 31 Cal.App.3d 395, 182 Cal.Rptr. 443..... 18

City of San Jose v. Superior Ct., (1985), 166 Cal.App.3d 695, 212 Cal.Rptr. 661..... 18

Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991).....11, 12

Duarte v. City of San Jose, (1980) 100 Cal.App.3d 648, 161 Cal. Rptr. 140 (G.C. §845.8(b) 18

Fargo v. City of San Juan Bautista, 857 F.2d 638, 641 (9th Cir. 1988): 6

Hooper v. City of Chula Vista, (1989) 212 Cal.App.3d 4421, 260 Cal.Rptr. 495 .....18, 19

Ramos v. County of Madeira, (1971) 4 Cal.3d 685, 94 Cal.Rptr. 421, 484 P.2d 93..... 19

Redman v. County of San Diego, 942 F.2d 1435 (9th Cir. 1991) 5

Reenders v. City of Ontario, (1977) 68 Cal.App.3d 1045, 137 Cal.Rptr. 736 19

Rivas v. Freeman, 940 F.2d 1491 (11th Cir. 1991)..... 13

Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir. 1991)..... 14

Stark v. City of Los Angeles, (1985) 168 Cal.App.3d 276, 214 Cal.Rptr. 216 18

Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988) 6

Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989)..... 5

STATUTES

42 U.S.C. § 1983 ..... 4, 11

California Tort Claims Act of 1983 (G.C. §810 *et seq.*) 16

Fourth Amendment to the Constitution 7

Government Code §845.8(b) 18, 19

U.S. Const. Amend XIV, § 1 5

Vehicle Code §17001 16

Vehicle Code §17004 20

Vehicle Code §17004.7 ..... 19, 20

MISCELLANEOUS

I. INTRODUCTION

On May 22, 1990 a Sacramento County Sheriff, James Everett Smith, killed a 16 year-old motorcycle passenger, Philip Lewis, with his patrol during a nighttime high-speed chase that reached speeds of 100 mph through residential streets. (Neufeld Affidavit, Ex. B, ¶¶ 5, 6, 13). The officer was chasing the motorcycle as close as 100 feet behind it at speeds that would take the officer over 650 feet to stop with neither occupant of the motorcycle even wearing a helmet. (Neufeld Affidavit, Ex. B, ¶¶ 7-8). The chase was initiated by Smith for no articulable reason and without knowledge of any violation of law. (Blaricom Affidavit, Ex. A, ¶ 5(c).)

The chase was conducted entirely in violation of Department policy in that there was never any required communication with a supervisor and because the policy dictated that the chase be terminated since the danger to the unprotected victim passenger and others obviously outweighed any need for apprehension since there was no known offense committed other than traffic violations occurring during the chase itself. (Blaricom Affidavit, Ex. A, ¶ 5)

The record discloses further that just prior to impact with Philip, the officer was knowingly driving under road conditions of a visually obstructed incline followed by a downgrade at a speed which outran his headlights, his ability to see, and his ability to stop, in egregious violation of the motor vehicle code (Neufeld Affidavit, Ex. B, ¶¶ 7-10; Blaricom Affidavit, Ex. A, ¶¶ 6-7) and to the mortal detriment of Philip Lewis who had departed the motorcycle as it came to a virtual stop at the end of

the downgrade. (Blaricom Affidavit, Ex. A, ¶ 3; Neufeld Affidavit, Ex. B, ¶¶ 5, 13). The officer's 4,000-pound vehicle ruptured virtually every major organ in Philip's body upon impact and hurled Philip almost 70 feet down the highway, fracturing Philip's skull as he tumbled down the pavement before his body finally came to rest. Philip was pronounced dead at the scene. (Neufeld Affidavit, Ex. B, ¶ 13)

The plaintiffs, Teri and Thomas Lewis, Philip's father and mother, filed an action in the Sacramento County Superior Court against the County of Sacramento, Sacramento County Sheriffs Department and Sheriff James Everett Smith for Deprivation of Civil Rights under 42 USC § 1983 and for Wrongful Death under California state law. (Complaint filed March 11, 1991). Defendants removed the case to this Federal Court on the basis of federal question. Defendants now present a Motion for Summary Judgement on numerous grounds including:

1. Plaintiffs have failed to establish a violation of Federal Civil Rights under 42 U.S.C. 1983;

2. James Smith is exempt from liability for violations of Federal Civil Rights based on qualified immunity;

3. Plaintiffs have failed to establish a custom and practice of violating Federal Civil Rights against Sacramento County and the Sacramento County Sheriff's Department;

4. Defendants are immune from liability on the state law claims by reason of California Government Code

§ 845.8 (b) and California Vehicle Code §§ 17004 and 17004.7;

5. Defendants are not liable on the state law claims because plaintiffs have failed to establish proximate cause.

Plaintiffs contend that defendants Smith, the County of Sacramento and the Sacramento County Sheriff's Department all violated Philip Lewis's constitutional rights; that neither Smith nor the County of Sacramento nor the Sacramento County Sheriff's Department is immune from liability under any defense or statute; that defendants' actions were the legal cause of Plaintiffs' son's death

Plaintiffs further accordingly assert that there are genuine issues of material fact to be tried and that none of the defendants are entitled to judgment as a matter of law.

II. SUMMARY JUDGMENT MUST BE DENIED SINCE DECEDENT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS IN VIOLATION OF 42 U.S.C. 1983

As Defendants own moving papers correctly concede: "There are two plausible avenues to analyzing a 1983 claim involving pursuits. . . . a culpable deprivation of life, liberty or property by one acting under a color of state law could be viewed as a violation of substantive due process . . . Alternatively, the injuries inflicted on plaintiff could be considered to be part of an officer's attempted seizure of the fleeing suspect, so that an unreasonable pursuit in the nature of excessive force would

violate the Fourth Amendment" (Defendants Motion for Summary Judgment, pg. 11, ln 21 - pg. 12, ln 1, citations omitted.)

Plaintiffs certainly satisfy deprivation of life in violation of substantive due process and defendants Motion for Summary Judgment must be denied.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, and citizen of the Untied [sic] States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Fourteenth Amendment to the Constitution provides that "no State shall deprive any person of life or liberty without due process of law." *U.S. CONST. Amend XIV*, § 1. The substantive due process component of this amendment protects a person's right to personal security. *U.S. CONST. Amend XIV*, § 1, note 7. Thus, in high speed pursuits, the central focus in determining Fourteenth Amendment violations involves balancing the individual's interest in his bodily integrity with the government's interest in law enforcement.

The Ninth Circuit has resolved this balancing by requiring that the conduct of the officer rise to the level of "gross negligence" or "recklessness" or "deliberate indifference". As stated most recently by the Ninth Circuit

Court of Appeals in *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir., 1991):

> 6. This case does not present the question whether gross negligence or recklessness gives rise to a due process violation outside of the jail or prison context. Although the Supreme Court has not yet decided that question, we have. See *Fargo v. City of San Juan Bautista*, 857 F.2d 638, 639, 641 (9th Cir.1988) (holding that police officer could be held liable under section 1983 for accidently shooting handcuffed arrestee in the back if the jury found that his conduct amounted to gross negligence or recklessness)."
>
> 942 F.2d 1435, 1440, footnote 6.

See also *Woodrum v. Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989), citing *Wood v. Ostrander*, 851 F.2d 1212 (9th Cir. 1988) (intentional assertion of government power that tended to show a disregard of the plaintiff's physical safety may amount to *gross negligence*, recklessness or deliberate indifference sufficient to overcome the *Daniels* or *Davidson* bar and to state a cause of action under § 1983). (emphasis supplied)

The evidence in this case shows that decedent Lewis' interest in life outweighed Officer Smith's interest in law enforcement under the circumstances and that the level of the conduct could be interpreted as reckless or worse by a reasonable jury. As stated in *Fargo v. City of San Juan Bautista*, 857 F.2d 638, 641 (9th Cir. 1988):

> When reasonable persons may disagree as to whether particular conduct constitutes negligence, gross negligence or recklessness, *the question is one of fact to be decided by a jury.* (emphasis supplied).

In the present case, the acts of defendant Officer Smith could surely be interpreted by a reasonable jury as at least "reckless" if not "deliberately indifferent". The chase was initiated for no articulable or objective reason, in complete disregard and contravention of Department policy, conducted in a residential area at night with visually obstructed crests and valleys which were known to the officer, reached speeds of 100 miles per hour while chasing a motorcycle carrying a trapped innocent teenager known to be not wearing a helmet, at distances as close as 100 feet at speeds it would take the officer over 650 feet to stop, lasted for approximately one and a half minutes, through at least 4 stop signs and three 90 degree left turns, covered over a mile and a quarter, and resulted in the officer completely loosing [sic] all control of his vehicle and striking and killing Philip Lewis when the motorcycle finally did come to a stop.

Additionally, plaintiff's expert Van Blaricom concludes that officer Smith "operated his patrol vehicle so recklessly out of control as to have been deliberately indifferent to the safety of the decedent." citing, among others facts, that Smith was unable to control his vehicle in a driving emergency of his own making, violated the California Motor Vehicle Code, violated Department Policy concerning pursuits, and acted completely without justification or rational law enforcement purpose. (Blaricom Affidavit, Ex. A, ¶¶ 5-7)

Under these circumstances it is submitted that a reasonable jury could conclude that Smith's conduct was at least "reckless" or "grossly negligent" if not "deliberately indifferent" and accordingly the Motion for Summary Judgment must be denied.

III. SUMMARY JUDGMENT MUST BE DENIED BECAUSE THE DECEDENT WAS SUBJECTED TO EXCESSIVE FORCE DURING A SEIZURE IN VIOLATION OF 42 U.S.C. 1983

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Brower v. County of Inyo, 489 U.S. 593 (1989), relied upon by defendants in their motion as their sole authority on what constitutes a seizure, the Court was careful to note that one may not consider the *subjective intent* of the officer in determining if a seizure had occurred. The Court stated:

> In determining whether there has been a seizure in a case such as this, [it is not possible] to distinguish between a roadblock that is designed to give the oncoming driver the option of a voluntary stop (i.e. one at the end of a long straightaway), and a roadblock that is designed precisely to produce a collision (e.g. one located just around a bend). In determining whether the means that terminates the freedom of movement

> is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock – and that he was so stopped. *Brower*, 489 U.S. at 598-99.

The *Brower* Court applied this rationale to two hypothetical situations involving high-speed police pursuits.

The first hypothetical situation involved a police pursuit in which the suspect lost control of his car and crashed. In determining that no seizure had occurred, the *Brower* Court noted:

> the pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means – his loss of control of his vehicle and the subsequent crash. *Brower*, 489 U.S. at 597.

In the second hypothetical situation, the Brower Court determined there was a seizure under circumstances in which the police pursuit vehicle collided with the fleeing car. The Court said that the termination of the suspect's freedom of movement in this situation would have been a seizure.

> If, instead of that, the police cruiser had pulled alongside the fleeing car and side-swiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.
>
> *Brower*, 489 U.S. at 597.

In the instant case, *both the plaintiffs' and defendants' experts conclude that the patrol vehicle driven by Smith did, in fact. collide with the motorcycle as do the witnesses.* (Blaricom Affidavit, Ex. A., ¶ 4). Thus the facts in this case are most similar to those presented in the second hypothetical situation in which the *Brower* court concluded that a seizure had occurred.

Furthermore, the patrol car in the present case was set in motion at its intended object (the motorcycle) and terminated the freedom of movement of that object by physically striking it. Because we may not look at the officer's *subjective intent*, it is inappropriate to inquire whether Officer Smith intended a voluntary stop, or an involuntary stop. A Court commits reversible error if it instructs a jury on a Fourth Amendment claim to consider whether officers acted maliciously. *Graham v. Connor*, 109 S.Ct. at 1873.

Thus, we must surmise for the purpose of the analysis, that the facts in the *Brower* second hypothetical are *most similar* to those in the instant case in addressing the seizure question. Under the *Brower* definition, there was a seizure. To use *Brower's* exact language: "it is enough for a seizure that [Lewis] was stopped by the very instrumentality set in motion [Smith's patrol car] in order to

achieve that result." We may not consider Officer Smith's subjective intent.

Moreover, the force used was disproportionate to the need for the force. Plaintiffs submit that Lewis' interest in his life far outweighed defendant officer Smith's (the government's) interest in apprehension. The use of deadly force to apprehend a passenger on a speeding motorcycle whose driver left a group of police officers under ambiguous circumstances at best, is clearly a violation of the passenger's Constitutional rights under the Fourth and Fourteenth amendments. Even assuming arguendo that speeding after the pursuit was initiated could form the basis for continuing the pursuit, speeding is not an offense punishable by death and the force used was excessive.

The defendants in this case are therefore subject to 42 U.S.C. § 1983 liability on the basis of Fourth Amendment seizure also. The question of whether the force Officer Smith used in striking and killing decedent Lewis was disproportionate to the need for the use of said force, and thus a violation of decedent's Constitutional rights, is a question of fact which should be presented to the jury. Defendants Motion for Summary Judgment must be denied.

IV. SUMMARY JUDGMENT MUST BE DENIED BECAUSE PLAINTIFFS CAN SHOW DEFENDANTS SACRAMENTO COUNTY AND SACRAMENTO COUNTY SHERIFF's DEPARTMENT'S FAILURE TO TRAIN ITS OFFICERS IN HIGH-SPEED PURSUITS CONSTITUTED RECKLESS DISREGARD OR DELIBERATE INDIFFERENCE FOR DECEDENT'S CONSTITUTIONAL RIGHTS.

The Ninth Circuit Court of Appeals has clearly established the criteria necessary to determine liability against a municipality for failure to train its officers in a 42 U.S.C. § 1983 action. In *Davis v. Mason County*, 927 F.2d 1473, (9th Cir. 1991) the court stated in determining there was, indeed, failure-to-train liability as a matter of law:

> The training that the deputies received was woefully inadequate, if it can be said to have existed at all. Sheriff Stairs himself never attended the State Training Academy and Undersheriff Harry "Bud" Hayes had neither training nor experience . . . Deputy Quantz had received no training whatsoever prior to the Taylor incident . . . Instead of academy training, the Sheriff's Department devised a "field training program" for the officers. While this program may have seemed adequate on paper, in practice it was never followed . . . The field training program was supposed to include tests, reports, and reviews by the field training officer and supervising sergeant on a periodic basis, yet there is no evidence that this was ever done.
>
> . . . .
>
> The issue is not whether the officers had received *any* training – most of the deputies

> involved had *some* training, even if it was minimal at best – rather the issue is the *adequacy* of that training. (emphasis supplied).

In this case, defendant Officer Smith has had *some* training in high-speed driving, *no training whatsoever in pursuits*. Defendant Officer Smith attended advanced officer school in controlling a high speed vehicle once in 1976 and again in 1979. He has *never* had any EVOC (Emergency Vehicle Operation Course) training where one car chases another car. (Smith Depo p. 105, lines 14-21). Officer Smith has been with the Sacramento County Sheriff's Department for 20 years. (Smith Depo p. 106, line 10).

A Sheriff's Department which allows its officers to engage in high-speed pursuits, as the County did here, but gives its officers no training whatsoever in high speed pursuits and only minimal training in high speed driving over 11 years ago, is "deliberately indifferent to" or "in reckless disregard for" the safety of others as a matter of law.

Plaintiffs' expert, Van Blaricom, who provided, and was qualified to provide, pivotal testimony on the ultimate question of whether there existed a "deliberate indifference" in the County's training in the *Davis* case, *supra*, Cert. denied 112 S.Ct. 275 (1991), specifically concludes, enumerating the reasons therefore, that the governmental defendants in this case were "deliberately indifferent to training deputy Smith in pursuit." (Blaricom Affidavit, Ex. A, ¶ 8) and furthermore that defendant Smith was "negligently supervised" (Blaricom Affidavit, Ex. A, ¶ 9).

Plaintiffs can show failure-to-train liability against defendants Sacramento County and Sacramento County Sheriff's Department as a matter of law. Summary judgment should therefore be denied.

V. SUMMARY JUDGMENT MUST BE DENIED BECAUSE OFFICER SMITH CANNOT BE ACCORDED GOOD FAITH QUALIFIED IMMUNITY

First, qualified immunity defense does not apply to officers sued in their official capacity. The qualified immunity defense is available to those governmental officials sued in their individual capacities, but does not apply in an official-capacities-lawsuit. *Rivas v. Freeman*, 940 F.2d 1491 (11th Cir., 1991).

> We first note that Rivas's complaint alleged constitutional deprivations pursuant to 42 U.S.C. s 1983 against the deputies in their official capacities. The Supreme Court in Harlow states that qualified or good faith immunity is an affirmative defense available to government officials sued in their individual capacities for civil damages based upon their discretionary acts. Harlow, at 815, 102 S.Ct. at 2736. This is an official-capacities-lawsuit; thus, we hold that a qualified immunity defense is not available in this lawsuit.
>
> *Rivas v. Freeman*, 940 F.2d 1491 at 1494-1495 (11th Cir., 1991).

To determine whether the defense of qualified immunity applies to a particular individual, the capacity in

which that individual has been sued must first be ascertained. A review of plaintiffs' complaint reveals that Officer Smith is being sued in both his individual and official capacities. His official capacity is set forth in paragraph 6 of plaintiffs' complaint: "Defendant James Everett Smith is, and at all times mentioned herein was, an officer and employee of the Sacramento County Sheriffs Department and in doing the things hereinafter described, acted within the scope of his employment." Should there be any dispute by defendants as to the capacity in which defendant Officer Smith has been sued, such a dispute should be resolved in favor of the court finding that the individual defendants have been sued in both their official and individual capacities. To the degree that Officer Smith has been sued in his official capacity a qualified immunity defense is not available, hence defendants' motion for summary judgment in that regard must be denied.

Second, Officer Smith cannot be accorded good faith qualified immunity in his individual capacity. In *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991), the Court stated:

> The defense of qualified immunity protects "government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> . . . .
>
> The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct. If plaintiff carries this burden, then the officers must prove that their conduct was reasonable even though it might have violated constitutional standards. *Benigni v. City of Hemut*, 879 F.2d 473, 479-80 (9th Cir. 1988) ("We have expressly held that good faith is an affirmative defense that a police officer must prove.").
>
> . . . .
>
> The qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so clearly established as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue.

In the present case, Officer Smith cannot be accorded the good faith qualified immunity because the evidence shows that decedent Lewis' Constitutional rights under the Fourth and Fourteenth Amendments to life and unreasonable seizure had been clearly identified, alleged, established and violated.

Additionally, defendants have not, and cannot as a matter of law, show that a reasonable officer could have believed his actions were lawful. This is at least a question of fact for the jury. The evidence shows that officer Smith was aware of no legal violation prior to officer Smith's decision to undertake a minute and a half pursuit of the motorcycle with a trapped teenage victim on the back without a helmet, at speeds in excess up to 100 miles per hour in a residential area at night with many crests and valleys at distances as close as 100 feet at times when it would have taken over 650 feet to stop. The evidence

further shows that defendant officer Smith struck and killed decedent Lewis after having blindly reached the top of a crest in the road and after being unable to stop in time to avoid hitting the stopped motorcycle and killing its 16 year-old passenger. Both passenger decedent Lewis and driver Willard did not present a risk to others if left at large. Speeding is not an offense punishable by death, especially if you are merely a passenger in, or on, the speeding vehicle. No *objectively reasonable* officer could see otherwise.

Officer Smith cannot be afforded the good faith qualified immunity. Summary Judgment must therefore be denied.

VI. DEFENDANTS ARE NOT IMMUNE FROM LIABILITY UNDER GOVERNMENT CODE §845.8(b) OR VEHICLE CODE §§ 17001.4 OR 17004

A municipality may be held liable for negligent acts committed by police officers in pursuit of a fleeing suspect. The existence or extent of such breach is a question of fact. Defendants have failed to establish sufficient facts to enable this court to summarily adjudicate plaintiff's Third Cause of Action.

Defendants' analysis of the relationship between statutory immunities under the California Tort Claims Act of 1983 (G.C. §810 *et. seq.*) and V.C. §17001 inappositely refers to G.C. 845.8, confuses the standard of care, ignores the pertinent authority and urges this court to rely on a single revisionist appeals court case (from a different appellate district) involving a widely variant and easily distinguishable factual scenario.

In 1978, the California Supreme Court, in bank (sic), explained the liability of a municipality for an employee's negligent operation of a motor vehicle:

> Vehicle Code §17001 makes a public entity liable for its employee's negligence in the operation of a motor vehicle. That section provides: 'A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment.'

V.C. §17001, Bummett v. County of Sacramento, (1978), 21 Ca1.3d 880, 883-884; 148 Cal.Rptr. 361, 582 P.2d 952.

The comment of the Law Revision Commission relative to V.C. §17001 reads, in pertinent part:

> The Government Liability Act specifically imposes liability on public entities for the intentional as well as the negligent torts committed by public employees in the scope of their employment. This amendment removes any doubt which may exist concerning the applicability of this principle to torts involving the operation of motor vehicles. See Van Alstyne, *California Government Tort Liability,* §7.67 (Cal. Cont. Ed. Bar 1964).
>
> Cal. Law Revision Com. comments to Veh. Code §17001, West Ann. Veh. Code (1971 Ed.), p. 91.

Bummett, a review and subsequent reversal of a grant of summary judgment, examines in detail the legal duties of a peace officer to a third party while the officer is engaged in a high-speed chase of a suspect. The facts bear

considerable similarity to the case at bar. Briefly, two Sacramento County sheriff's deputies, engaged in a high-speed pursuit of a suspected robber, smashed into a pickup truck driven by a third party, injuring the occupants. *Bummett* at 882-883.

The Court there stated "the law does not permit the police to drive with impunity from the moment they activate their sirens and flashing lights." *Bummett* at 885-886. The court held that the duty imposed upon a police driver in a high-speed pursuit was that, despite the acknowledged emergency pursuit, a driver "must nonetheless drive in such a manner as would not impose upon *others* an unreasonable risk of harm." *Bummett* at 886. Once that duty is established, "due care as an element of negligence presents a question of fact for the jury. (Citation) If the circumstances permit a reasonable doubt whether defendant's conduct violated the boundaries of due care, the doubt must be resolved as an issue of fact by the jury rather than of law by the court." *Bummett* at 887.

It is undisputed that defendant driver was driving at high speeds at night on a residential street, visibility on which was restricted. It is further undisputed that plaintiff's decedent was not the driver being chased, that defendant's vehicle left 127 feet of 4-wheel locked skid on the downhill side of the blind hill and that defendant's vehicle struck and killed plaintiff's decedent. Based on the above, the court must deny defendants' motion as to plaintiff's Third Cause of Action.

Similarly, Government Code § 845.8(b) is inapplicable in this case, and the defendants are not immune thereunder. While a municipality may indeed be immune from liability "for any injury caused by 1) an escaping or escaped prisoner; 2) an escaping or escaped arrested person; or 3) a person resisting arrest," (G.C. §845.8(b)), defendant fails to demonstrate how this statute could possibly apply to this case. Obviously, Officer Smith was not a prisoner, arrested person or person resisting arrest. Yet it was Officer Smith's vehicle that struck and killed decedent Philip Lewis.

Defendants' lengthy dissertation on *Hooper v. City of Chula Vista*, (1989) 212 Cal.App.3d 4421, 260 Cal.Rptr. 495, is equally puzzling, as the case is factually quite different from the case at bar. In *Hooper*, plaintiff's decedent was a motorcycle driver wielding a weapon who led police on a prolonged chase, then died when he lost control of his motorcycle. The court characterizes its discussion as an examination of statutory immunity of a city whose police officers, "pursuit of a fleeing suspect resulted in injury or death *of the suspect*." (*Hooper* at 443, emphasis supplied.)

The *Hooper* court, admits its interpretations of §845.8(b) are at variance with other courts of appeal (e.g., *City of San Jose v. Superior Ct.*, (1985), 166 Cal.App.3d 695, 212 Cal.Rptr. 661 and *Stark v. City of Los Angeles*, (1985) 168 Cal.App.3d 276, 214 Cal.Rptr. 216). *Hooper* at 449. Indeed, it is probable that the Fourth Circuit has taken an impermissibly broad and unbalanced view of the extent of that limited statutory immunity. [See, e.g., *City of Sacramento v. Superior Court*, (1982) 31 Cal.App.3d 395, 182 Cal.Rptr. 443 (finding the immunity did not apply where a fleeing suspect struck another vehicle); *Duarte v. City of*

San Jose, (1980) 100 Cal.App.3d 648, 161 Cal. Rptr. 140 (G.C. §845.8(b) immunity held not to apply when a pedestrian was struck by a fleeing escapee). Additionally, see, *Ramos v. County of Madeira*, (1971) 4 Ca1.3d 685, 94 Cal.Rptr. 421, 484 P.2d 93, in which the California Supreme Court emphasized that, unless the legislature confers immunity in clear terms, the general policy of providing compensation for the victims of negligence must prevail over the exceptions of immunity.

Nonetheless, the *Hooper* court clearly limits its holdings to those circumstances where claims were brought by "the subject of the police pursuit, the suspect himself or his heir, than to those made by innocent injured third parties." *Hooper* at 454.

Besides the clear language limiting the court's examination, the facts of this, and the other cases cited by defendants are distinguishable. Defendants' attempts to equate the behavior of the suspect Willard and his hapless passenger, Philip Lewis, with the outrageously reckless and admittedly felonious conduct of the fleeing motorcyclists in *Hooper* and *Reenders*[1] is ultimately frivolous.

Vehicle Code §17004.7 is also inapplicable to this case. That section confers limited immunity on a public entity under certain, carefully delimited situations. It provides, in pertinent part, that:

[1] *Reenders v. City of Ontario*, (1977) 68 Cal.App.3d 1045, 137 Cal.Rptr. 736).

> A public agency employing peace officers which (sic) adopts a written policy on vehicular pursuits . . . is immune for civil damages for personal injury to or death of any person or damage to property *resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being*, has been, or believes he or she is being or has been, *pursued by a peace officer* employed by the public entity in a motor vehicle.

V.C. 17004.7(b).

While Officer Smith could arguably be considered "an actual or suspected violator of the law," clearly, the officer was not being pursued. As indisputably the only collision involved in this case was between Officer Smith's vehicle and Philip Lewis' body, defendants' reliance on this statute borders on the frivolous.

Finally, defendants assertion that defendant Smith is automatically absolutely immune pursuant to V.C. § 17004 has no basis in law. As the California Superior Court has observed: "The law does not permit the police to drive with impunity from the moment they activate their sirens and flashing lights." *Brummett v. County of Sacramento* (1978) 21 Cal 3d. 850, 885, 886, 148 Cal.Rptr. 361, 582 P.2d. 952. Whether or not officer Smith may be adjudicated immune pursuant to the statute is a question of fact for the jury.

Furthermore, while defendants assert that Smith's pursuit was pursuant to this Vehicle Code section, the fact that defendant Smith had no articulable purpose for following Willard to begin with gives rise to a factual

dispute that cannot be resolved in Summary Judgment and must therefore be decided by a jury.

Defendants Motion for Summary Judgment must be denied.

VII. DEFENDANTS WERE AN OBVIOUS PROXIMATE CAUSE OF THE DEATH OF PHILIP LEWIS

Defendants are unable to cite any cases even remotely resembling the instant factual situation and further cannot cite even a single California case for their ludicrous assertion that "Lewis and Willard were the sole proximate cause of Philip Lewis' death."

Among the disputed facts cited already in this opposition are the facts that officer Smith ran Philip Lewis down and killed him with a 4000 pound police vehicle and hurled him about 70 feet down the roadway rupturing virtually every organ in his body on impact and fracturing his skull as he tumbled down the street. A jury could therefore reasonably find defendants to be a proximate cause of Philip Lewis' death as does plaintiffs' expert Van Blaricom (Blaricom Affidavit, Ex. A, ¶ 11).

Defendants Motion for Summary Judgment must therefore be denied.

VIII. SUMMARY

For the reasons stated above, Defendants Motion for Summary Judgement should be denied in its entirety.

DATED: February 7, 1993

KANANACK, MURGATROYD
& BAUM

By: /s/ Paul J. Hedlund
Paul J. Hedlund
Attorneys for Plaintiffs

Paul J. Hedlund, Esq.
Kananack, Murgatroyd & Baum
12100 Wilshire Boulevard, Suite 650
Los Angeles, California 90025
(310) 207-3233

ATTORNEYS FOR: Plaintiffs
TERI & THOMAS LEWIS, Personal Representatives
of the Estate Of PHILIP LEWIS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of Estate of PHILIP LEWIS,	)	No. Civ. S-91-505 LKK/GGH
Plaintiffs,	)	**DECLARATION OF PAUL J. HEDLUND**
vs	)	
COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100,	)	
Defendants.	)	

I, Paul J. Hedlund, declare and state:

1. I am an attorney duly licensed to practice law in the State of California and in this Federal Court and I am one of the attorneys who represent the plaintiffs in this action.

2. This declaration is made in opposition to the Motion for Summary Judgement filed by the defendants.

3. Attached to this Opposition as Exhibit C are true and correct copies of the relevant pages of the deposition of defendant officer Smith taken on July 22, 1992.

4. Attached to this Opposition as Exhibit D are true and correct copies of the relevant pages of the deposition of plaintiffs' expert Van Blaricom taken on October 2, 1992.

I declare under penalty of perjury that the foregoing is true and correct and that if called as a witness, I could and would competently testify thereto.

Executed this 8th day of February, 1993 at Los Angeles, California.

/s/ Paul J. Hedlund

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representative [sic] of the Estate of PHILIP LEWIS	)	
Plaintiffs,	)	No. Civ. S-91-505 GEB/GGH
vs.	)	
COUNTY OF SACRAMENTO SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100	)	
Defendants.	)	

AFFIDAVIT OF D. P. VAN BLARICOM

The undersigned being first duly sworn, on oath states as follows:

1. That my name is D. P. Van Blaricom and I make this affidavit on behalf of plaintiffs. I was the Chief of Police for the City of Bellevue, Washington from January 1, 1975 thru December 31, 1985 and my law enforcement career spanned 29 years of continuous police service. A detailed statement of my qualifications is set forth on the attached Exhibit "A", which by reference is made a part hereof. My areas of expertise in the police sciences include but are not necessarily limited to control of police vehicular pursuits; police policy and administration;

police standards, practices and procedures; civil rights violations; internal investigation and police discipline. I have testified as a police expert opinion witness in state and federal courts on a variety of police-related issues for both plaintiff and defense.

2. I was retained by plaintiffs' attorney Paul J. Hedlund to review the facts and circumstances of a police pursuit accident on May 22, 1990 wherein a Sacramento County Sheriff's emergency vehicle being driven by defendant Deputy James E. Smith struck and killed Philip Lewis. In formulating my opinions I discussed the matter with plaintiffs' counsel and at the time of making this affidavit I have reviewed the following documents:

a. Complaint;

b. Answer;

c. First amended answer;

d. Accident investigation;

e. Coroner's report;

f. Deputy Smith's deposition;

g. General Order on Operations of Sheriff's Department Vehicles;

h. Responses to interrogatories;

i. CHP Officer Snider's deposition;

j. Plaintiffs' expert Neufeld's deposition;

k. Defendants' summary judgment motion;

l. Defendants' expert Dart's deposition; and

m. Defendants' expert Stephenson's deposition.

3. In my professional opinion there is no question whatsoever that defendant Smith struck the decedent with his patrol vehicle either while he was on the motorcycle or immediately after he had dismounted. In reaching that conclusion I considered the following facts:

a. The statement of the other rider Brian Willard that "Philip got hit pretty hard by the patrol car";

b. The Forensic Laboratory's report to the District Attorney states –

1) "Transfers indicative of a possible contact with victim Lewis were found on the corner of the left fender of the patrol car."

2) "Hair fragments and textile fibers from the left front fender are consistent with exemplars from victim Lewis and his shirt. A serous-like stain, that, gives a positive reaction for human species, is present at this site."

3) "Three, short, light brown hair fragments were collected from the corner of the left front fender at the head lamp bezel. They were compared to the exemplar head hair sample of decedent Phillip (sic) Lewis. They exhibit microscopic properties which fall within the range of those exhibited by the exemplar sample. They are consistent with originating from Lewis."

4) "Three red polyester fibers were removed from the crack in the left lateral turn signal/clearance light lens. These match in color, size, and delusterant, to the polyester fibers in the textile which trims

the collar and sleeve openings of Lewis' shirt."

5) "There was a serous/fatty tissue appearing stain on the upper edge of the left lateral turn signal lens and on the adjacent area of the headlamp bezel. A sample was collected from the bezel. An extract of the stain gave a positive test for human species."

c. The MAIT (major accident investigation team) report states that "It is concluded that at some point near the motorcycle's overturn the patrol car contacted and accelerated the deceased."

d. Investigating Officer Snider reported that "V-2 (the patrol vehicle) slid past in the S/B lane and the passenger (Lewis) was struck by the L/front of V/2."

e. Investigating Officer Snider testifed [sic] in his deposition that it was his opinion "the patrol vehicle had made contact with the victim Mr. Lewis" and the whole investigation team "all agreed with that opinion in the end."

f. Defendants' expert Stephenson testified in his deposition that there is no question but what the patrol car hit the decedent.

4. In my professional opinion defendant Smith's patrol vehicle more probably than not rammed the motorcycle but whether that was intentional or not is a fact issue upon which I cannot speculate. In reaching that conclusion I considered the following facts:

a. The statement of the other rider Brian Willard that the "motorcycle was hit on the left rear

side" and "right when they got hit is when Philip was thrown off the motorcycle."

b. The statement of witness Matt Schneider that he "heard an impact before the motorcycle hit the ground."

c. The statement of witness Jeanne Patterson that "the police car hit the motorcycle."

d. The statement of witness Orin Ehringer that "the police car hit the motorcycle."

e. The statement of Jeffrey Sayles that "the car made contact with the motorcycle."

f. The statement of witness Nick Anderson that "it looked like the patrol car hit something."

g. The Forensic Laboratory's report to the District Attorney states that an examination of the decedent's clothing found "a horizontal tear at the crease of the right buttock and back right thigh. Below this there appears to be an IMPACT (emphasis supplied) transfer on the surface of the fabric." and that "This material was found to have microscopic and infrared properties consistent with those of the Naugahyde-like upholstery fabric of the motorcycle seat."

h. Investigating officer Snider reported that "Some witnesses indicated that V-2 (the patrol vehicle) actually struck V-1 (the motorcycle). There is damage to the rear portion of the motorcycle seat and to the back around the rear of seat. The fender under the seat was also dented inward. This damage appears to be new damage and I can not explain how the motorcycle sustained this damage."

i. Defendants' expert Stephenson testified in his deposition that the patrol car had struck the motorcycle.

5. In my professional opinion defendant Smith's pursuit of the decedent violated the Sacramento County Sheriff's Department General Order on "Operation of Sheriff's Department Vehicles. In reaching that conclusion I considered the following facts:

a. That order mandates that –

1) "It is the **DUTY** (emphasis supplied) of the driver of an authorized emergency vehicle to exercise that amount of care which, under all circumstances, would *not* (Department's emphasis) impose an unreasonable risk of harm upon others."

2) "The officer **MUST** (emphasis supplied) consider the following:

Does the seriousness of the offense warrant a chase at speeds in excess of the posted limit?

Does the need for, and possibility of apprehension, justify a pursuit under the existing conditions?

Does the pursuit present unreasonable hazards to life and property?"

3) "Unit initiating pursuit – responsibilities

Upon commencing a pursuit, the initiating officer **SHALL** (emphasis supplied) immediately broadcast the following:

Officer's unit designation
Location and direction of travel

Vehicle description
Reason for pursuit"

4) "The initiating officer **SHALL** (emphasis supplied) voluntarily abort a pursuit when, in the officer's opinion the hazards of continuing outweigh the benefits of immediate apprehension."

b. In this pursuit, however, defendant Smith –

1) Did not fulfill his duty to "not impose an unreasonable risk of harm upon others under all circumstances" when he struck the decedent with his patrol vehicle.

2) Did not balance the need to apprehend for a minor traffic infraction against the known risks of pursuit and actually caused the driving of the pursued to become more dangerous by continuing therein.

3) Did not broadcast the pursuit at any time.

4) Did not "voluntarily abort the pursuit" when the obvious hazards thereof clearly "outweighed the benefits of immediate apprehension".

c. There can be no justification or rational law enforcement purpose to be served by initiating a high speed pursuit of 2 teenagers without helmets on a motorcycle simply because another deputy yelled "something" at them when he admittedly did not even know what was said or why he was chasing them.

d. It is well known to law enforcement officers that young people will often do foolish things

when confronted by the police but that is not a reason to chase them into a likely accident just because they run.

6. In my professional opinion defendant Smith violated the California Vehicle Code. In reaching that conclusion I considered the following facts:

a. Section 21056 states that any exemption granted to emergency vehicles ". . . does not relieve the driver of a vehicle from the **DUTY** (emphasis supplied) to Drive with due regard for the safety of **ALL** (emphasis supplied) persons using the highway".

b. Section 22350 requires that "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of the highway, and in **NO EVENT** (emphasis supplied) at a speed which endangers the safety of persons or property."

c. And yet, defendant Smith drove his vehicle at high speed into the person of the decedent when he had stopped on the roadway ahead of him.

7. In my professional opinion defendant Smith was operating his patrol vehicle so recklessly out of control as to have been deliberately indifferent to the safety of decedent. In reaching that conclusion I considered the following facts:

a. Although he testified in his deposition that he has "no idea" how fast he was going, both investigating Officer Snider and plaintiffs' expert Neufeld calculated his minimum speed at

65 mph when he began braking before striking decedent in the roadway.

b. Defendants' expert Stephenson testified in his deposition that –

1) The patrol vehicle's speed when braking started was "between 59.8 to 64.9 mph."

2) The motorcycle had been stopped on the roadway "in the vicinity of 2 seconds" before being struck by the patrol car.

3) At a separation of 300 feet between them, "the Sheriff's Office vehicle could have slowed down in time to avoid the accident."

c. Defendants' expert Dart testified in his deposition that the pursuit travelled 1.25 miles over 1 minute and 15 seconds in a 30 mph speed zone through 4 stop signs and three 90 degree angle left turns during which defendant Smith "was slowing down for the intersections to clear the intersections; that he did not break traction; there was no squealing tires as far as his car was concerned."

d. That being the case, defendant Smith's **AVERAGE** (emphasis supplied) speed during the pursuit was 59.86 mph but was, of course, substantially higher than that between his 4 slowings for stop signs and turns.

e. Such high speed is consistent with witness statements –

1) Jeanne Patterson stated that "both vehicles were travelling at 80 to 100 mph" when they passed her just before the accident and "the Sheriff was approx. 100 feet behind the motorcycle."

2) Orin Ehringer stated that "the m/c (motorcycle) was travelling at approx. 100 mph and the patrol car was approx. 150 feet to its rear, also at approx. 100 mph" just before the motorcycle started braking.

f. After topping a rise in the roadway to suddenly find that the motorcycle he was pursuing had stopped, defendant Smith **LOCKED UP HIS BRAKES** (emphasis supplied) to slide in a straight line for 147 feet before striking decedent at a speed of 36 mph, travelled another 19 feet until leaving the roadway to knock over a mail box and finally came to rest 32 feet further on in a residential front yard.

g. Defendants' expert Stephenson testified in his deposition that "certainly the driver of the vehicle, without releasing the brakes **CAN'T EXERCISE ANY SIGNIFICANT DEGREE OF DIRECTIONAL CONTROL**" (emphasis supplied).

h. It is clear that defendant Smith was unable to bring his vehicle under control when faced with a driving emergency of his own making and the probable consequence of his willful and wanton disregard for the safety of others.

i. This was certainly more than what defendant Smith described to defendants' expert Dart as being just a "ho hum chase" in which he was only "following versus chasing".

j. Whether intentional or not, defendant Smith's seizure of the decedent was so objectively unreasonable as to have been a grossly excessive use of force.

8. In my professional opinion the Sacramento County Sheriff's department was deliberately indifferent to training defendant Smith in pursuit. In reaching that conclusion I considered the following facts:

a. As illustrated on the attached Exhibit "B", California POST (peace officers standards and training) teaches basic course students that a patrol vehicle can be more deadly than a firearm.

b. The court has recognized that "high speed pursuits are no different than the use of firearms".

c. The minimum standard of care for the use of firearms is semi-annual training in both how to shoot and when to shoot.

d. The California Highway Patrol trains their officers quarterly (4 times per year) on pursuit policy.

e. Defendant Smith had received no pursuit training whatsoever and only minimal training in high speed driving over 10 years during sometime in 1979.

f. And, he had never received any EVOC (emergency vehicle operation course) training whatsoever. It is significant to note that had he been given such readily available training, he more probably than not would have known that a vehicle with locked brakes cannot be steered and he would have driven around the decedent rather than slide into him.

9. In my professional opinion defendant Smith was negligently supervised. In reaching that conclusion I considered the following facts:

a. The Sacramento County Sheriff's Department General Order on Operation of Sheriff's Department Vehicles states that "All command and supervisory officers are charged with giving particular and continuing attention to the driving behavior of their subordinate personnel, ensuring that they adhere to safe, reasonable driving methods, and that they follow the regulations contained within this order. Appropriate action shall be taken by superior officers on a continuing basis to ensure that improper driving behavior is recognized and corrected through counseling, training or disciplinary measures."

b. In spite of that mandate and defendant Smith's several violations of the General Order as previously enumerated herein, he was not admonished in any way.

10. In my professional opinion it is the actual custom and policy of the Sacramento County Sheriff's Department to violate their General Order on Operation of Sheriff's Department Vehicles. In reaching that conclusion I considered the following facts:

a. Although the General Order states "Officers are not to use patrol vehicles as a barricade/roadblock to stop a vehicle", that is how this pursuit began when another Deputy did precisely that.

b. Defendant Smith has testified in his deposition that he has "absolutely not" changed his personal pursuit policy as a result of this incident.

c. The Sacramento County Sheriff's Department has ratified his official conduct in conducting and continuing this pursuit to the death of decedent.

11. In my professional opinion and in summary of all of the opinions previously expressed herein the proximate cause of decedent's death was:

a. The Sacramento County Sheriff's Department custom and policy to engage in pursuits that violate their own standards of care;

b. Their deliberate indifference to the training of defendant Smith in pursuit; and

c. Defendant Smith's reckless operation of his police vehicle during this pursuit in such a manner as to strike and kill decedent.

/s/ D. P. Van Blaricom
D. P. VAN BLARICOM

SUBSCRIBED AND SWORN to before me this 14th day of December, 1992.

/s/ Janice Van Blaricom
NOTARY PUBLIC in and for
the State of Washington
residing at Bellevue.
My Commission expires
11/~~10/~~95.

EXHIBIT "A"

D. P. VAN BLARICOM, INC.
MPA, FBI-NA, CHIEF OF POLICE (RET.)
POLICE EXPERT
835 91ST LANE NORTHEAST
BELLEVUE, WASHINGTON 98004-4811
(206) 453-0082 FAX (206) 453-3263

SUMMARY OF QUALIFICATIONS

A. Retained as a police expert by both plaintiffs and defendants in over 300 lawsuits alleging police liability throughout the United States.

B. Testified on numerous occasions in federal courts, state courts and arbitrations.

C. Recognized as an expert on the issues of:

1. Police use of force;
2. Less-lethal alternatives to deadly force in both equipment and tactics;
3. Police dogs as use of force;
4. Control of police vehicular pursuits and emergency driving (my policy was recommended by the Public Risk and Insurance Management Association of Washington, D.C. as being among the 4 best such policies in the U.S.);
5. Police policy and administration;
6. Police standards, practices and procedures;
7. Special duties to protect;
8. Domestic violence (I am quoted by the National Law Enforcement Policy Center in the development of their model policy);

9. Civil rights violations (42 U.S.C. Section 1983);
10. Internal investigation and police discipline;
11. Affirmative action (subject of master's thesis);
12. Wrongful discharge from employment;
13. Collective bargaining;
14. Firearms; and
15. Private security issues.

D. Served 29 years in municipal policing with the last 11 as Chief of Police (until retirement and election to the City Council at the end of 1985) in Bellevue, Washington – The State's fourth largest and fastest growing city.

E. Directed development of a progressive police department and created several model programs, including: control of vehicular pursuits, alternatives to deadly force, fully integrated emergency response team operations, domestic violence reduction, affirmative action employment of minorities and women, comprehensive crime prevention, lateral recruitment of experienced officers, police canine operations, multi-city narcotics unit and others. Additionally, co-authored the Washington State Standards on Internal Discipline of Law Enforcement agencies.

F. Served on many professional commissions and committees, including: Washington Criminal Justice Education & Training Center Steering Committee, Bellevue Community College Local Advisory Council and Chairman Law Enforcement Program Advisory Board, Washington Attorney General's Committee on Security and Privacy, consultant to U.S. Department of Justice Community Relations Service, intern with 94th Congress, Governor's appointee to Community Task Force for Corrections

Development, Washington State Council on Crime & Delinquency's Adult Criminal Policy Committee and Ad Hoc Committee on Board of Prison Terms/Paroles, Youth Eastside Services Board of Trustees, Eastside Community Mental Health Center Advisory Board, King County Executive's appointee to E911 Task Force, U.S. Attorney's Law Enforcement Coordinating Committee, Governor's appointee to Select Committee for Police/Fire Pension Review, IACP's Education & Training Committee, IACP's Organized Crime Committee, Assessor Team Leader for 1 of 5 Pilot Projects of the Commission on Accreditation for Law Enforcement Agencies, Governor's appointee to the Emergency Commission on Prison Overcrowding, IACP book reviewer, Suburban Cities Association's Jail Advisory Committee, Governor's Advisory Group on Personal Harassment, Portland, Oregon Chief's Committee on Police Use of Force. Assisted the appointing authorities at various times in selecting Chiefs of Police for Cities of Longview, Everett, Bellingham, Richland, Bremerton, Kirkland, Redmond, Clyde Hill, Kent (1991), a Sheriff of King County and the Security Administrator of Seattle City Light (all in the State of Washington), King County Regional Justice Center Citizens Site Advisory Committee, Superintendent of Public Instruction's Washington State Safe Schools Advisory Committee.

G. Hold a security clearance from the U. S. Government.

H. Maintain an extensive and current library of standards, policies, procedures, references, depositions and information on other experts with subscription services to update professional and legal developments in my areas of expertise.

EDUCATION

University of Washington – bachelor of arts degree with magna cum laude honors in 1973

Seattle University – master of public administration degree in 1976

Graduate of the FBI's National Academy and Law Enforcement Executive Development programs

Numerous and continuing professional training courses

TRAINING EXPERIENCE

Taught law enforcement courses at the Bellevue Police Academy, Washington Criminal Justice Education and Training Center, Bellevue Community College, Seattle University, Northwestern University's Traffic Institute and International City Management Association's Training Institute. Lectured on police-related issues before the University of Washington School of Law and Graduate School of Public Affairs, Simon Fraser University, American Civil Liberties Union, Washington State Bar, Seattle-King County Bar, Washington State Court Administrators, Washington Association of Legal Secretaries, American G. I. Forum, United States Justice Department Community Relations Service, National Institute of Law Enforcement and Criminal Justice, U. S. Attorney General's Task Force on Family Violence, Montana Department of Social and Rehabilitation Services, Washington Advisory Committee to the U.S. Commission on Civil Rights, American Society of Criminology, National Association of Police Planners and International Association of Police Planning and Research Officers, Labor Relations

Information System. Additionally, served on the Law Enforcement Education Advisory Committee to the Washington State Board for Community College Education in developing their statewide curriculum and also achieved the first college accreditation of a Basic Law Enforcement Academy in the State of Washington.

PUBLICATIONS

"Recruitment and Retention of Minority Race Persons as Police Officers" in September 1976 issue of the *The Police Chief* magazine, "An Overview of Police Service Today" in the April 18th and May 2nd, 1978 issues of *Law Enforcement News*, "Kids Meet Cops Through Basketball Trading Card Program" in the July 9th, 1979 issue of *Law Enforcement News*, "A Police Chief's View of Deadly Force" in the National Institute of Law Enforcement & Criminal Justice's January 1979 booklet on Police Use of Deadly Force, "Career Development: The Next Step to Police Professionalism" in the November 1979 issue of *The Police Chief* magazine, "Crime Prevention Cuts Insurance Cost" in the August 1980 issue of *Center City Report*, "A Sensible Alternative to Those High-Speed Chases" in the November 25, 1980 issue of *The Seattle Times*, "Chiefs Should Chase Sane Pursuit Driving Guidelines" in the September 22, 1980 issue of *Law Enforcement News*, "Commercial Crime Prevention Can Earn Discounts" in the February 1981 issue of the *FBI Law Enforcement Bulletin*, "Enforcing Malicious Harassment Laws" in the January 1983 edition of Washington Council on *Crime and Delinquency News*, "Reducing Crime, Traffic Accidents – Bellevue Shows It Can Be Done" in the May 10, 1983 issue of *The Seattle Times* and the June 27, 1983 issue of *Law Enforcement*

News, "Carrying A Gun – It Depends On You" in the February 3, 1985 issue of the *Journal-American*, "When To Use Deadly Force" in the Winter 1985 issue of the *Washington Law Enforcement Executive Journal*, "Domestic Violence – A New Approach to an Old Problem" in the June 1985 issue of *The Police Chief* magazine, "In Pursuit Of The Pursuers – Police Pursuit Liability" in the 1987 issue of *The Expert Witness Reporter*, "It's Time for Police. To Re-Examine Their Role In Society" in the October 1, 1989 issue of *The Seattle Times*, "Shaking The Pillars of Police Tradition" in the October 31, 1989 issue of *Law Enforcement News*, "Training – The First Hundred Years" in *Law Enforcement In Washington State: The First Hundred Years 1889-1989*, "K-9 Use of Force: A Biting Example of Questionable Policy" in the July/August 1992 issue of *Law Enforcement News*.

NATIONAL TELEVISION APPEARANCES

1984 – NBC Nightly News in a special report on the dangers of highspeed pursuit.

1985 – NBC Today show in an interview on personal protection against criminal attack.

PROFESSIONAL MEMBERSHIPS

International Association of Chiefs of Police, Police Executive Research Forum, Americans for Effective Law Enforcement, FBI National Academy Associates, Washington Association of Sheriffs & Police Chiefs (Life Member).

OTHER ACTIVITIES AND ASSOCIATIONS

Present –

Planning Committee Chairman of the Museum of Flight Executive Committee, Chairman of The Emerald City Flight Festival, Wing Luke Asian Museum Advisory Board, Washington State Retired Deputy Sheriffs/Police Officers Association, Retired Bellevue Police Officers Association, Pioneer Association, Columbia Tower Club Founder Member, Lakes Club Board of Governors, National Defense Executive Reserve, Bellevue Convention Center Authority Board Member and Chairman of the Design Oversight Committee, President of Friends of Eastside Arts.

Past –

Salvation Army's Metropolitan Seattle Advisory Board, Seattle University Alumni Association Board of Governors, *Journal-American* Board of Contributors, Historical Society of Seattle and King County Board of Trustees, Secretary of State's Advisory Group on Charitable Solicitations, King County Landmarks. Commissioner, Bellevue Downtown Park Review Committee, Co-Chairman of Bellevue Chamber of Commerce Legislative Committee, Search and Screening Committee for Selection of Bellevue Community College President Washington State Civil Air Patrol Citizens Advisory Council, Statewide City Employees Retirement System elected Trustee, City of Bellevue Disability Board, Municipal Employees Benefit Trust Retirement Committee, City of Bellevue Liaison to the Washington State Legislature, Bellevue Rotary Club, Aircraft Owners and Pilots Association as an FAA licensed commercial airplane and glider pilot with ratings

for single engine land and sea, multi-engine land and instrument operations, elected Bellevue City Councilmember (did not run for re-election), Chairman of Wings Over Washington Centennial Celebration, Bellevue Repertory Theater Advisory Board, Woodland Park Zoo Bond Oversight Committee, United Olympic Life Insurance Company Board of Directors.

AWARDS

USMC Expert Rifleman 1953-1956, FBI "Possible Club" 1970 (of the 19,130 police officers who attended the FBI National Academy during the 50 years from when it started to the year of my retirement in 1985, I was 1 of only 165 who fired a perfect score on the PPC or TRC), Outstanding Community Service from Bellevue Jaycees 1979, Human Rights (Implementing Law and Order with Justice) from Baha'i Communities of Bellevue and Eastside 1980, Youth Service from the Chief Seattle Council of the Boy Scouts of America 1983, Program Innovation from the King County Domestic Violence Coalition 1983, Support and Service from Bellevue Cadet Squadron Auxillary USAF 1984, Law Enforcement Appreciation from the Puget Sound Chapter of the American Society for Industrial Security (presented by the Governor of the State of Washington) 1984, Outstanding Volunteer Service from the Salvation Army 1984, Outstanding Service as a Public Official Citizenship Award from the Bellevue Kiwanis Club 1985, Award for Public Service from The U.S. Department of Justice 1986, Appreciation for Service from the Woodland Park Zoo Bond Oversight Committee 1990, Appreciation for Service from the King County Executive 1992.

ILLUSTRATION #1

.44 Magnum Revolver

Weight of Bullet 240 grains

Muzzle Velocity 1350 fps. (920 mph)

Foot pounds of energy
at muzzle 970

People it could kill - maybe 3 with an average of 325 fp per person.

Car

Weight of Vehicle 3500 pounds

Velocity 88.02 fps. (60 mph)

Foot pounds of energy
at impact with stationary
object 196,875

People it could kill about 605 with an average of 325 fp per person.

EXHIBIT B

Paul J. Hedlund, Esq.
Kananack, Murgatroyd & Baum
12100 Wilshire Boulevard, Suite 650
Los Angeles, California 90025
(310) 207-3233

ATTORNEYS FOR: Plaintiffs
TERI & THOMAS LEWIS, Personal Representatives
of the Estate of PHILIP LEWIS.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of Estate of PHILIP LEWIS, Plaintiffs, vs COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants.	No. Civ. S-91-505 LKK/GGH **DECLARATION OF DARREL NEUFELD**

I, Darrel Neufeld, declare and state:

1. I am an expert in accident reconstruction and police procedures and have been retained by the plaintiffs in this case. A detailed statement of my qualifications is attached to the end of this declaration.

2. I have previously given my deposition in this matter on September 22, 1992.

3. In forming my opinions and conclusions in this case, I have spoken on many occasions with plaintiffs' counsel, Paul J. Hedlund, as well as the paralegals at the offices of Kananack, Murgatroyd & Baum; I have interviewed the plaintiffs, Teri and Thomas Lewis; I have inspected the subject motorcycle involved in this case; I have surveyed the scene of the incident; I have made many critical measurements and performed numerous calculations; and I have reviewed the complaint together with the answers filed; the accident investigation report together with all attachments including the MAIT report, the coroners' report; and I have also reviewed the depositions of deputy Smith, officer Snider, expert Dart, expert Stephenson, and expert Van Blaricom. These materials are the type of materials normally relied upon by experts in my fields of expertise and, to the extent relied upon by myself, are considered reliable by me in my evaluations herein.

4. For the purposes of summary and ease of presentation, much of my conclusions are distillations of my deposition testimony and summaries of the facts of the incident taken from numerous sources which would be otherwise cumbersome and confusing to cite.

5. On May 22, 1990 deputy Smith struck and killed Philip Lewis during a nighttime high speed chase of a motorcycle driven by Brian Willard.

6. During the chase, I have concluded that officer Smith's vehicle reached speeds of almost 100 mph in zones with a posted speed limit of 30 mph. I base that conclusion on the facts that Smith's average speed during the course of the chase was at least 60 mph based on a 1.25 to 1.3 mile course and an elapsed time of 1 minute 15 seconds as testified to by expert Dart and officer Smith and that the path of the chase encompasses 4 stop signals and three 90 degree left turns during which officer Smith has testified that he slowed sufficiently to prevent his tires from squealing or loosing traction. This speed is also consistent with the statement of witnesses Jeanne Patterson and Orin Ehringer. given in conjunction with the investigation of this case.

7. I also conclude that officer Smith was following the motorcycle at distances *as close as* 100 to 150 feet in egregious violation of the California Vehicle Code. I base this conclusion on the facts that officer Smith testified that as he came over the crest in the roadway just prior to the collision he saw smoke coming from the tires of the motorcycle as the motorcycle was skidding to a stop and the testimonies of witnesses Jeanne Patterson and Orin Ehringer who place the trailing distances of the patrol vehicle at 100 feet and 100-150 feet respectively.

8. I also conclude with little difficulty that officer Smith during the chase, and certainly just prior to impact with the decedent Philip Lewis, was recklessly travelling

at speeds in excess of his ability to stop for likely obstacles or circumstances. At speeds of 100 mph, for example, the total stopping distance needed is over 650 feet and even at 65 mph the total distance needed to stop is over 330 feet yet deputy Smith was travelling as close as 100 to 150 feet behind a motorcycle which affords its occupants no protection whatsoever for impact, has no seatbelts, and is carrying a helpless passenger who is not even wearing a helmet.

9. I also conclude that officer Smith during the chase, and certainly prior to impact with the decedent Philip Lewis, was travelling at speeds in excess of his ability to see ahead. I base these conclusions on the speeds deputy Smith reached during the chase and the speed he was driving just prior to braking after coming over the crest in the road before striking and killing the decedent Philip Lewis. After extensive surveying of the area making precise measurements, it is clear that Smith was unable, given his line of sight over the terrain, to see obstacles which might have been in front of him, including the subject motorcycle, in sufficient time to stop or even slow down significantly. In this latter regard, it is noted that Smith began braking at 65 mph and struck Mr. Lewis while still travelling about 40 mph. Furthermore, any contention that the brake light was not functioning, which I find impossible under the upside-down installation explanation given since the bulb cannot be installed upside down, is irrelevant since deputy Smith could not see the brake light as he approached the crest in the roadway. I conclude this from deputy Smith's own testimony that he could not see below the occupants waists and my own measurements and calculations.

10. I also conclude that officer Smith was aware of the crest in the road and the conditions of the terrain as he was chasing the motorcycle at what were clearly excessive speeds. I base this conclusion on my own years of experience and what I perceive as a similar background of officer Smith as well as the testimony of expert Dart to whom officer Smith admitted great familiarity with the area in question.

11. There also can be no question that officer Smith was aware that there was a passenger on the back of the motorcycle who was not in control of the motorcycle and who was in essence a trapped victim and that neither persons on the motorcycle was wearing a helmet.

12. I further conclude that, although officer Smith may not have known the exact ages of the individuals involved, he must have been aware that they were youths and not mature adults. I base this conclusion on the facts that the motorcycle passed within feet of officer Smith and from the boys dress, apparent weights and erratic impetuous behavior.

13. Upon impact by the 4000 pound patrol vehicle travelling almost 40 mph., virtually every major organ in Philip Lewis' 16 year old body was ruptured. The impact with the automobile hurled Philip Lewis almost 70 feet down the road fracturing his skull as he tumbled on the roadway and causing Philip Lewis' death. I base these conclusions on the coroners' report, the accident report, my own measurements, as well as the deposition testimonies and my own experience in investigating and analyzing over 2000 accidents throughout my career as a

police officer and an expert reconstructionist and investigator.

I declare under penalty of perjury that the foregoing is true and correct and that if called as a witness I could and would competently testify thereto.

Executed this 9th day of February, 1993 at Folsom, California.

EXHIBIT C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of Estate of PHILIP LEWIS, Plaintiffs, vs. COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants.	)	#Civ S-91-505 LKK/GGH

Wednesday, July 22nd, 1992

2:15 p.m.

DEPOSITION OF JAMES E. SMITH

DIANA J. KAYL, C.S.R. #2406

WESTERN REPORTERS
Certified Shorthand Reporters
8880 Cal Center Drive, Suite 180
Sacramento, CA 95826
Phone: 336 5600

* * *

[p. 23] any point during this pursuit?

A Well, if you want me to place an answer, answer that proper, I could guarantee I was doing under 100 and over 30.

Q That's fine. So if someone were to testify that you were doing 80 miles an hour or so during the pursuit, that would be within those limits and you would have no information from your own knowledge to dispel that evidence?

MR. CASSIDY: That –

Q BY MR. HEDLUND: Correct?

MR. CASSIDY: – misstates his previous testify. So I'll object. He has already testified he was going less than 80 miles per hour.

Q BY MR. HEDLUND: Well, my understanding is now that you've estimated your speed to be under 100 and over 30, so that everything within that range is a possibility as far as you're concerned, correct?

MR. CASSIDY: You can answer the question but it still implicitly misstates his prior testimony.

THE WITNESS: I'm not going to answer that.

Q BY MR. HEDLUND: You're not going to answer that question?

A Correct.

MR. CASSIDY: I'll insert an objection for him as argumentative.

Q BY MR. HEDLUND: With respect to the estimate of your speed as under 100 and over 30, do I take it

* * *

[p. 47] Chestnut? Correct?

A I slowed down whether there was or was not a stop sign there.

Q I see. And the reason you slowed down was so you could make that corner, correct? Correct?

A So I could turn southbound Chestnut, correct.

Q Right. And you only slowed to that speed that you could make that turn without losing control of your car, correct?

A Say that again.

Q You only slowed to that speed necessary so that you wouldn't lose control of your car when you made your right-hand turn from Central to Chestnut?

A I was making a left-hand turn.

Q Was it – okay. You were making a left-hand turn from Central to Chestnut and you slowed your car only to that extent that was necessary so that you wouldn't lose control of your car, correct, during the car –

A Below that. I slowed down to where my tires did not squeal or screech or lose any control –

MR. CASSIDY: Your answer is a yes or no. Your answer is no.

THE WITNESS: Okay.

Q BY MR. HEDLUND: Can you estimate the speed that you were going when you made your left-hand turn through the intersection of Central and Chestnut?

A Approximate, 25 miles an hour, maybe.

* * *

[p. 54] quite heavily. I didn't as you phrased slam on the brakes.

Q Well, when you applied your brakes "quite heavily," you locked up all four wheels of your vehicle, didn't you?

A That's what the Highway Patrol report states, yes.

Q Do you have any reason to believe that that's not true?

A No, I don't.

MR. HEDLUND: Off the record.

(Off the record discussion.)

Q BY MR. HEDLUND: What did you first perceive that caused you to instigate this pursuit?

A Well, initially, my, there was another unit that observed the subjects on the motorcycle doing something. Motorcycle pulled between myself and the other unit. The other unit had activated his overhead emergency lights, pulled in towards my unit in order to stop the motorcycle. And at that point, there was two subjects on the motorcycle.

I heard my, the partner in the other unit yell something. I couldn't hear what he said because my windows

were up. And at that point, I looked over my shoulder and I observed two subjects on a motorcycle almost, by this time, they appeared to be either driving very slowly or almost walking the motorcycle, straddling the motorcycle, and between the two units. [p. 55] I turned my head, observed the two subjects that, they both looked at me at one time or another. And at that point they accelerated at a high rate of speed, fleeing from my partner's patrol car.

Q What did you – do you have an estimate of the high rate of speed that they started fleeing after they walked the bike between the two patrol cars?

A No, I don't.

Q Well, you've seemed to have no problem with the word high rate of speed or the phrase high rate of speed now. Do you have any estimate at all?

A No, I don't.

Q What do you mean by high rate of speed?

A Well, actually going up and beyond the speed limit at a fast acceleration.

Q When they accomplished this fast acceleration, did you see smoke come from the tires at all?

A No. I did not.

Q Do you have an estimate of the weight of the two people who were on the motorcycle at the time you first observed them?

A No, I do not.

Q Do you, to this day, can you give us an estimate of their weights?

A No.

Q Have you in the past – well, over the five years preceding this incident, had you engaged in pursuits of vehicles in excess of the posted speed

• • •

[p. 66] you had no reason to believe that the motorcycle was stolen, correct?

A Not at that point, no.

Q Do you have any reason to believe today as we sit here that the motorcycle in question was stolen?

A Well, it turned out it was stolen. I didn't ever say it was stolen. I may have, maybe in the back of my mind, there's a possibility I thought it might have been stolen.

Q Do you recall entertaining the notion that the motorcycle in question in this incident on May 22, 1990 that you had a conscious question that this motorcycle may be stolen?

A Possibly at the end of the pursuit.

Q The policy that you're to follow when you're in pursuit is, as you put it, to notify dispatch of the pursuit and the general direction, correct?

A Notify dispatch – you asked my thoughts on it, not from the paperwork?

Q Yes, right.

A Was notifying dispatch and the direction of travel.

MR. CASSIDY: And I believe he also indicated –

THE WITNESS: Supervisor.

MR. CASSIDY: – get the supervisor involved.

Q BY MR. HEDLUND: Okay. Were you able to notify dispatch of this pursuit, the general direction and [p. 67] pursuit prior to your car coming to rest.

A I attempted to, yes.

Q Were you able to?

A No, I was not.

Q On how many occasions during the pursuit, that is the time period after you began to drive your car rapidly towards the motorcycle in question until it came to rest on someone's lawn did you attempt to comply with the pursuit policy by notifying dispatch, telling them the direction and getting a supervisor involved?

A I believe it was twice.

Q And on each occasion that you attempted to so comply, you realized that you were unsuccessful, correct?

A Yes.

Q How did you officially attempt to contact dispatch?

A Through radio in the patrol unit.

Q How do you physically contact dispatch using the radio in the patrol unit?

A Taking it off the holder, pressing the mike key, talking into it. And advising them where I was at and what was in this, that I was in pursuit.

Q And which hand do you use to take the mike out of the holder to contact dispatch?

A My right hand.

Q Which handed, are you –

[p. 68] A Which hand did I –

Q No, which handed –

MR. CASSIDY: Are you right- or left-handed?

THE WITNESS: Oh, I'm right-handed.

Q BY MR. HEDLUND: And how long did the process of taking, how long did the process of taking the mike out of the holder attempting to contact them with your right hand and then I assume returning it to the holder take?

A Just a matter of seconds.

Q When you attempted to contact the dispatch, did you only talk into it once?

MR. CASSIDY: I don't understand the question. Vague and ambiguous.

Q BY MR. HEDLUND: Well, what do you say when you push the button on the microphone? What did you say at the time of this incident when you pushed down on the mike?

A I don't know at what time, but basically, it was advising her that I was in pursuit of a motorcycle, that I

was westbound Central from Main Avenue. Initially, I advised her of which unit is my unit number and then advising her –

Q And then what do you do, lift up on the button and expect a response?

A Yes.

Q And that response didn't come, correct?

A That's right.

[p. 69] Q Did you push down on the button again and make the same announcement?

A Not at that, not at that split second, no. It was a short time later.

Q How long a time later did you attempt the same thing?

A Time wise, I really couldn't tell you. But it was just as we turned, either just as or as, just after turning south down Chestnut Avenue, I attempted to advise dispatch again.

Q And on that occasion, did you make that announcement as to your car number and that you were in pursuit more than once or just once?

A Just once the first time, once the second time.

Q And when you let up on the button, no one answered?

A That's right.

Q And do you have information which leads you to understand why no one answered on both those occasions?

A Yes, I do.

Q What is that information?

A Do you want – I was on the channel five, which is a non dispatching channel through our main radio.

Q I'm sorry, you were on channel five?

A You want me to describe the channels to you?

MR. CASSIDY: No, don't describe the channels.

THE WITNESS: Oh, I'm sorry.

[p. 70] MR. CASSIDY: Let him ask the question.

Q BY MR. HEDLUND: Would you please describe the channels that you use in the communications?

MR. CASSIDY: Use the main channel and channel five. You can describe those.

THE WITNESS: For our dispatching purposes out in the area we were in is channel four, which we get dispatched our calls to contact the main radio through. Channel five is the car-to-car radio. If officer wants to contact officer, if we're going to a certain location to determine whether we want to turn left at this street or turn right at that street.

Q So you announced over channel five on both of those occasions, correct?

A Yes, sir, yes.

Q How did you determine that you had announced over channel five?

A Well, once the pursuit was over, I realized that I hadn't gotten any response. I tried calling radio one more time. And then I looked up on the printout and it showed five instead of four.

Q When you communicate on channel five, don't the other cars around hear you?

A Only if they're on channel five.

Q Why had the radio been set to channel five?

A Myself and another officer responded to a call on Orangevale Avenue. And prior to getting there, prior to approaching Orangevale to [p. 71] determine once we got to Orangevale whether we wanted to turn left on Orangevale or turn right on Orangevale. So we went to channel five. And basically, whichever one of us was basically doing the talking says, do we turn left or do we turn right. He said left. We turned left. And we were right there at the call that we were initially responding to. At that point, we exited the vehicles and handled the call.

Q So it was you who set the radio to channel five, correct?

A I'm not sure which one of us said go to channel five.

MR. CASSIDY: In your own car, though?

Q BY MR. HEDLUND: But you're the one who individually set the radio to channel five?

A Oh, yes, I did.

Q Has the policy on pursuits changed at all to the best of your information from what it was on May 22, 1990 to the present?

A Not that I'm aware of.

Q Have you personally changed your policy concerning pursuits in anyway because of this incident?

A Absolutely not.

Q The documents that you brought, Exhibits One Two and Three, which will be attached to your deposition, are they the only documents that you

* * *

[p. 75] you intend to cause the death of Mr. Lewis?

A Absolutely not.

Q If knowing what you do now, that Mr. Lewis died as a result of the pursuit, would you do the same thing again?

MR. CASSIDY: No. Objection. That calls for speculation. Don't answer the question.

Q BY MR. HEDLUND: How many stop signs did you to your knowledge go through without stopping during the pursuit?

A I believe, if you're talking about a complete stop, I'd say one, possibly one.

Q Is that the possible east/west stop on Central?

A On, I believe there's a stop sign at Walnut and Central. I believe that's the, that's the one, because I really can't remember if there's one at Chestnut.

Q So you know that there's a stop sign at Walnut –

A Yes.

Q – and Central?

A I'm fairly positive there's one at Walnut and Central for east and west Central.

Q You're equally certain, are you not, that you did not stop for that stop sign?

A Not a complete stop, no.

Q What was the lowest speed you believe you came down to?

[p. 76] A Maybe 20, 30 miles an hour.

Q Is Walnut and Central between Main and Chestnut?

A Yes, it is.

Q Midway?

A I don't know about midway. It's in there somewhere.

Q How fast was the motorcycle going – did you see the motorcycle go through the stop sign at Walnut and Central?

A Yes, I did.

Q And how fast was the motorcycle going when it went through the stop sign –

A I'm not sure of the speed but he made no attempt to slow down at all.

MR. CASSIDY: Make sure you let him finish his question.

THE WITNESS: Oh, sorry.

MR. CASSIDY: That's all right.

Q BY MR. HEDLUND: It has never been your contention, correct, that a person should die for evading arrest, correct?

MR. CASSIDY: I'm going to object as vague and ambiguous, incomplete hypothetical. Instruct him not to answer.

Q BY MR. HEDLUND: You don't think the punishment for what occurred on this night should be the death of anyone, correct?

* * *

[p. 85] MR. CASSIDY: Why don't you use right, left? You now have east and west.

THE WITNESS: Okay.

MR. CASSIDY: I just want to make sure it's clear. Did you veer your car to the right or the left?

THE WITNESS: I veered the car to the right.

Q BY MR. HEDLUND: Did you feel your car impact anything after you went over the crest and before you came to rest?

A No, I did not.

Q But in fact, you had definitely hit some type of post, hadn't you, in somebody's lawn?

A Yes, I did.

Q Did you break it off?

A I believe so.

Q Was there a mailbox attached to it?

A I believe so.

Q But you didn't feel that?

A No, I did not.

Q And as you went by the intersection of Orangevale and Chestnut, did you see Mr. Lewis standing in front of your car?

A No, I did not.

Q Did you ever – well, strike that.

As you went by the intersection of Orangevale and Chestnut, you suddenly saw a spray of blood across the front of your car, didn't you?

[p. 86] A Yes, I did.

Q And you saw Mr. Lewis rolling down the street, correct?

A Yes, I did.

Q Would you describe what Mr. Lewis looked like as he was propelled down the street when you saw him?

MR. CASSIDY: At what point?

Q BY MR. HEDLUND: Well, I only see one reference in your, in the pages. Let me –

MR. CASSIDY: You want to take five?

(Interruption in proceedings.)

Q BY MR. HEDLUND: We're back on the record. I show you a document entitled "Driver's Report of Accident, Sacramento County Number 90-46390." Do you recognize that document?

A Yes.

Q Did you fill that document out?

A No, I did not.

Q Did you cause it to be filled out?

A Did I cause it to be filled out?

Q Yes.

A I believe so.

Q And who did you direct to fill that document out?

A I – I didn't direct anybody to fill it out.

Q Would you describe the procedure in which that document to the best of your recollection was filled out? How did it come to get the typing on it that's

* * *

[p. 105] THE WITNESS: Not that I'm aware of.

Q BY MR. HEDLUND: Okay. You don't recall the Sacramento County Sheriff's Department making any policy statements or anything concerning pursuits since this incident?

A Not that I'm aware of.

Q Have you had any specific training in pursuits of vehicles?

A Specific training in?

Q Yes.

A Such as?

Q Well, controlling your vehicle at high speeds while pursuing another vehicle, things like that.

A Controlling high speed, I've had advanced officers' school. I'm not sure, I know one was roughly 1976 and I believe the other one was 1979. A rough, roughly the years. And there were simulated high speed lane changes, backing, various other, skid pans. But not, I don't believe I've gone to what they would call like an EVOC course where one car chases the other car.

Q That's what I'm mostly interested in. You have never had any specific training in chasing another car?

A No, I have not.

Q Would does EVOC stand for?

A I'll be honest with you, I don't know. I know that's just the term they use, that I have always [p. 106] heard it as for high speed pursuit training.

Q Have you always been with the Sacramento County Sheriff's Department as far as your law enforcement career?

A Other than a short stint with Novato Police Department and Marin County as a reserve, all of the time has been here.

Q How long have you been with the Sacramento County Sheriff's Department?

A I'm in my, just finishing up my 20th year.

Q You're still with them?

A Sacramento?

Q Yes.

A Yes, I am.

Q You plan to stay with them for some period of time?

A Well, either until I retire or they force me out of retirement.

Q How old are you now?

A How old am I?

Q Yeah.

A Forty-four.

Q Other than the things that you already described in this deposition of Mr. Lewis not getting off the bike when it was taken between the vehicles, I guess, and looking back on two occasions, and not exiting the bike, and your speculation as to what Mr. Lewis might have been doing when he came off the

• • •

EXHIBIT D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of PHILIP LEWIS,	)	No. Civ. S-91-505 GEB/GGH
Plaintiffs,	)	
vs.	)	
COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100,	)	
Defendants.	)	

Deposition Upon Oral Examination

of

D.P. VAN BLARICOM

12:00 P.M. – 4:30 P.M.

October 2, 1992

1325 Fourth Avenue, Suite 1300

Seattle, Washington

Mary M. Paradise

Court Reporter

• • •

[p. 52] First of all, quickly, with respect to Exhibit B, the matters you've reviewed, let me just make sure, have you reviewed any materials other than those listed there?

A. No, sir.

Q. Now, back to Defendant's Exhibit A, your opinions. Do the opinions set forth on these two pages consist of the sum total of your opinions and conclusions in this case?

A. At this time, they do.

Q. And have you conducted any independent investigation other than your review of the materials you referred to?

A. No, sir, I don't do that.

Q. Have you viewed the scene of this pursuit?

A. I have not.

Q. Let's start with your first opinion as they're listed on Defendant's Exhibit A.

A. All right.

Q. What is your first opinion?

A. My first opinion is that the pursuit violated the Sacramento Sheriff's Department general order on operation of vehicles.

Q. And what is your basis for that

• • •

[p. 59] that right?

A. He says he was not. However, they passed within feet of him. I think he should have had some idea as to their age, but even if, you know, he was totally ignorant of their age, I would think you would most normally find young people riding motorcycles. But if he thought they were adults, it really doesn't change anything.

Q. Now, also, you would agree Officer Smith observed these individuals on the motorcycle pull away at a high rate of speed?

A. Correct, and immediately run a stop sign.

Q. So there are two infractions beyond the failure to yield to Officer Stapps which are observed by Officer Smith?

A. Correct.

Q. And those would give him, then, the right to at least attempt to pull over those two individuals?

A. Correct.

Q. Okay. And I assume you would agree that Officer Smith does not have a duty to refrain from pursuing those individuals?

[p. 60] A. I don't think that you can create a duty. "Duty" has a very special meaning to me, and if you're talking about a legal duty, you can talk about a moral duty, you can talk about duties of – that are – that are required of him according to policy. There's several ways to define a duty.

MR. HEDLUND: In that regard, I want to pose an objection, then, that it is vague and ambiguous in the

use of the word "legal duty" – or "duty" and also calls for a legal conclusion.

BY MR. CASSIDY:

Q. Let's put it this way, then. I assume you would agree at the point that Officer Smith observes the individuals on the motorcycle accelerate down a residential street at a high rate of speed and run a stop sign, that he has the right to pull them over?

A. He has a right to initiate a pursuit and attempt to stop them, correct.

Q. And at that point, is he entitled to continue the pursuit?

A. I think he should have discontinued the pursuit when they ran the stop sign.

Q. Why?

[p. 61] A. Because it was clear from that point on they were going to elude apprehension, that they were going to undertake dangerous maneuvers to do so. You can't catch them, to begin with. A car will never catch a motorcycle, if it's any kind of a motorcycle. And so it was a fruitless chase from that point on and only served to put the two young people at hazard.

Q. You would agree that if following the running of that one stop sign the individuals on the motorcycle had yielded to the red light and siren, then that is certainly one possibility? In other words, it's not necessarily true that they would always continue to elude apprehension?

A. It's more likely than not they will once they start.

Q. So in your opinion, if a pursuit is continued, as we've been defining it here as opposed to the initiation, it is more likely than not that the person will continue to elude apprehension?

A. That's what the data shows.

Q. In what percents are the breakdown?

A. They're either going to have – it's more likely that they will have an accident or

* * *

[p. 65] MR. CASSIDY: That is apparent, but that doesn't mean that I don't know where we've started and stopped.

BY MR. CASSIDY:

Q. The question pending was, are there any other factual bases other than what you've already testified to as to why in your opinion Officer Smith should have discontinued the pursuit after observing the motorcycle with two subjects accelerate away at a high rate of speed from the location of the patrol units and run a stop sign?

A. I think that's the first point at which he should have considered discontinuing the pursuit and should have done so. There are subsequent – there's a subsequent period as well that was – that continued to show the hazards that he also disregarded, but this is the first – this is the first indication that the pursuit is – should be abandoned in accordance with the policy.

Q. Let's go through it again, then. Upon what facts do you base that opinion?

A. That you had two young people on a motorcycle not wearing helmets, which puts them

* * *

[p. 74] Q. All right. What else was there?

A. Because the vehicle was out of control.

Q. The patrol unit was out of control?

A. Yes, sir.

Q. At what point?

A. At the point that he crested that rise and saw a motorcycle stopping in front of him.

Q. And in what manner was it out of control?

A. First of all, he was going too fast for the conditions. Secondly, he was not capable of stopping his vehicle within the distance available to him. Third, instead of steering out of the accident, which is what he should have been trained to do if he wasn't, he put on the brakes and skidded in a straight line right into the decedent and then went on from there to go into the front yard of a residence and drive over a mailbox. By any definition, that's out of control.

Q. All right. Anything else?

A. The other thing is, he says in his deposition, he has no – he had no idea how fast he was going. That's – driving instructors, [p. 75] including California, tell them to always be aware of your speed, because you're going to be going much faster than you think you are. You'll find that in the California peace officer's pursuit driving manual. I think you'll also find it in their highway patrol

training. You will certainly find it in their highway patrol training here, and it's also provided to municipality and county agencies.

Q. The California pursuit driving manual?

A. It's by the California Peace Officers Association and it's written by a retired CHP driving instructor – God, I can't think of his name right now – a former sergeant who has also written – written an article stating that for the FBI Law Enforcement Bulletin. He's probably been published in other places too. I just can't think of his name right now. But being aware of your speed is extremely important in pursuit, and by Deputy Smith's own statement in his deposition, he had no idea how fast he was going.

Q. Anything else?

A. "Anything else" is –

Q. Well, as to this particular paragraph [p. 76] in which you feel that Officer Smith violated the general order.

MR. HEDLUND: I'm going to note an objection for the record that by breaking up the testimony and without refreshing his recollection as to what he's already stated, it becomes very difficult to answer questions like this. He can continue, but if it later appears that something has been left out, we'll understand why.

A. I think the primary issue under the duty to drive with due regard for the safety of all persons is the fact that his vehicle was out of control. That's why he hit him. I've never suggested that he intended to do so. And in law enforcement, there are preventable accidents and

non-preventable accidents, and this is certainly a preventable accident.

BY MR. CASSIDY:

Q. Why is that?

A. Because he was driving too fast for the conditions. He couldn't see what was happening ahead of him because of the rise in the roadway, as well as he may have been overdriving his headlights. Clearly when he perceived that he had to stop, he didn't have sufficient room to [p.77] stop.

He didn't take – he panicked. He didn't take the alternative of driving out of the accident, as he's taught to. He just locks up his brakes and skids straight into it. Any police officer, and certainly one who has had any training, knows you cannot drive – you cannot steer with locked wheels. It goes in a straight line, and then, of course, he ends up in somebody's yard. And all of that indicates to me that the vehicle was out of control.

He was – he was no longer able to bring the vehicle to a safe stop, and that's the absolute minimum that's required of a person driving a car under any circumstances is to avoid hazards. Clearly, if it's somebody that stepped out from the curb that hadn't been these kids who were in the same position, they would have gotten run over, too. Nothing would have changed. It would have been just some third party.

Q. So in your opinion, anytime an officer is engaged in a high speed pursuit, he continues to be under an obligation to be able to bring his vehicle to a safe stop?

A. Absolutely.

[p. 78] Q. Is there any indication to you that Officer Smith slowed down or attempted to stop when he realized that his visibility was restricted?

A. None that I'm aware of.

Q. At what point, based on your review of the materials, does Officer Smith become aware that his visibility is obstructed?

A. Officer Smith says he can see the top of the motorcycle, he can see the riders, but he cannot see the motorcycle itself. When – when Mr. Neufeld went out and looked at that – the distance – the height of the rise and so forth, it's his opinion that he could not have seen the motorcycle. So who is correct, I don't know.

Q. But isn't it also Mr. Neufeld's opinion that Officer Smith was braking because of the visibility problem –

A. I don't remember that.

Q. – in light of the perception-reaction time that Officer Smith would have had to have been reacting to the rise in the roadway as opposed to where the motorcycle was?

A. I don't remember that at all. If it's in there someplace, I missed it, because I simply [p. 79] do not remember that.

MR. HEDLUND: I think the record is clear that Mr. Neufeld just determined in his opinion when the pursuing vehicle began braking, not as to what he was braking for.

A. Well, he says – I'm sorry –

MR. HEDLUND: Go ahead.

A. He says on page 15 of his deposition, lines 18 through 21, that "the intersection of Chestnut and Orangevale is not in view of the location where Deputy Smith would have perceived, reacted and applied his brakes." So what he's saying is he couldn't have –

BY MR. CASSIDY:

Q. Couldn't have what?

A. Couldn't have applied his brakes. He had no – he had no reason to, that he couldn't see to where they were. And I know of nothing that suggests that Deputy Smith slowed for that rise. He didn't say he slowed. I think it's after the rise is where his brakes are applied.

I can't tell from this diagram, but there was a diagram in Mr. Neufeld's dep which showed how far back the rise was. It doesn't show in the CHP report, but what it does show is [p. 80] clearly, he applied his brakes and just, as we say, stood on them and skidded into the accident without steering. There's no – there's no deviation in his path until after the point where he struck – where he struck the decedent.

Q. So what does that tell you?

A. It tells me his vehicle was out of control.

Q. The next area is the basic speed law provision, I believe.

A. Right.

Q. Is there anything that you would add to your previous testimony regarding why Officer Smith violated the general order in terms of the basic speed law?

A. He was going too fast to stop when he observed an obstruction.

Q. So in your opinion, anytime an officer is involved in a high speed pursuit and he is going too fast to stop when he observes an obstruction, he is responsible for that?

A. By definition.

Q. And in your opinion, he is responsible to the fleeing suspect?

A. He's responsible to anybody.

* * *

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 12100 Wilshire Boulevard, #650, Los Angeles, California 90025.

On February 8, 1993, I served the foregoing document described as *Memorandum in Opposition to Defendants' Motion for Summary Judgment; Declarations of Paul J.*

Hedlund and Darrel Neufeld and Affidavit of Van Blaricom; Separaet [sic] *Statement of disputed and Additional Facts* on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, addressed as follows:

Terence J. Cassidy, Esq.
Porter, Scott
350 University Ave., #200
Sacramento, CA 95865

I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

( ) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(x) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 8, 1993 at Los Angeles, California.

/s/ A. C. Taylor
Alethiea C. Taylor

Paul J. Hedlund, Esq.
Kananack, Murgatroyd & Baum
12100 Wilshire Boulevard, Suite 650
Los Angeles, California 90025
(310) 207-3233

ATTORNEYS FOR: Plaintiffs
TERI & THOMAS LEWIS, Personal Representatives
of the Estate Of PHILIP LEWIS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS, Personal Representatives of Estate of PHILIP LEWIS,	)	No. Civ. S-91-505 LKK/GGH
Plaintiffs,	)	**PLAINTIFFS' SEPARATE STATEMENT OF DISPUTED FACTS AND ADDITIONAL FACTS**
vs	)	
COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100,	)	
Defendants.	)	

MOVING PARTYS' ALLEGED UNCONTROVERTED FACTS	OPPOSITION RESPONSE
1. On May 22, 1990, at approximately 8:30 p.m., Sacramento County Sheriff's Deputies James Everett Smith and Murray Stapp responded to a 415 Penal Code fight call at 9336 Orangevale Avenue in Orangevale in the course and scope of their employment.	Plaintiffs agree James Everett Smith was a Sheriff with the Sacramento County Sheriff Deputy acting within the course and scope of his employment at the time and date indicated. Plaintiffs object to other facts in this paragraph as irrelevant.
2. Officers Smith and Stapp had just handled the above call, had both just got back into their patrol cars and were ready to leave when Officer Stapp heard a motorcycle revving and then observed the motorcycle approach his location at a high rate of speed.	Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence.
3. Officer Stapp turned on his overhead lights and the motorcycle slowed down and continued towards his location.	Undisputed.
4. Officer Stapp pulled his car out into the street in an attempt to block the path of the motorcycle.	Undisputed.
5. The motorcycle continued up in between Officer Stapp's patrol car and Officer Smith's patrol car.	Undisputed.

6. Officer Stapp yelled at the driver to pull over so that they could talk.	Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence. Specifically and the only relevant consideration is the testimony of defendant Smith who states: "I heard my partner in the other unit yell something. I couldn't hear what he said because my windows were up." (Depo of James Smith 54:22-24). For all he knew, officer Stapp could have told the boys to scram, have a nice day, or anything. Yet he decided to pursue anyway, without any objective knowledge as to why he was pursuing.
7. Officer Stapp heard one of the two guys on the motorcycle say, "Fuck it, let's get out of here."	Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence.
8. The two motorcycle riders were not supposed to be seen together per "his" probation officer and Philip therefore told Willard to keep going when the officer told him to stop.	Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence.

9. The motorcycle maneuvered between the two patrol cars and accelerated away at a high rate of speed.	While it is undisputed that the motorcycle maneuvered between the patrol cars any contention that the motorcycle accelerated away at a high rate of speed is objected to as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence. Officer Smith testified that he did not have an estimate of how fast the motorcycle accelerated and did not see any smoke come from the tires. (Smith Depo 55:5-18).
10. Neither of the individuals on the motorcycle was wearing a helmet.	Undisputed. This fact should have been considered by Officer Smith in discontinuing the pursuit and only make his conduct in pursuing the motorcycle at high speeds all that much more egregious. This fact is otherwise irrelevant since state law did not then mandate motorcyclists to wear helmets.
11. Officer Smith accelerated after the motorcycle with red lights and siren on.	Undisputed.
12. From start to finish, the pursuit lasted approximately one minute and 15-20 seconds.	Undisputed.

13. It was Officer Smith's decision to continue or terminate the pursuit.	Disputed. Under the circumstances the department policy dictated that the pursuit be terminated. (Blaricom Affidavit, Ex. A, ¶ 5, pgs 6-9.)
14. At no time during the pursuit did Officer Smith know the identity or age of the fleeing suspects, nor the license plate of the fleeing motorcycles.	Disputed. The boys passed within a few feet of Mr. Smith who looked right at them and who were dressed and acted like youths. It is inconceivable that he would have absolutely no idea as to their youth. (Neufeld Declaration Ex. B, ¶ 12, pg 5.)
15. Officer Smith estimates that his speed was less than 80 mph, but more than 30 mph.	Disputed. Officer Smith testified that he was doing under 100 and over 30 mph. (Smith Depo 23:2-4). Witnesses indicate that Officer Smith was travelling about 100 mph. Expert Neufeld concludes the maximum speed of Smith was almost 100 mph. (Neufeld Declaration Ex. B, ¶ 6, pgs 2-3.)
16. During the pursuit, several cars had to swerve onto the shoulder of the road to avoid the speeding motorcycle.	Undisputed. This is further evidence that the pursuit should have been discontinued as it constituted a hazard not only to the persons on the motorcycle but also to others.

17. By pursuing Willard and Lewis, Officer Smith hoped to stop their erratic driving, which included driving on the wrong side of the street, and thereby prevent inevitable injury to others.	Disputed and objected to on the grounds it is irrelevant, selfserving evidence of subjective intent and contrary to fact and reality. Pursuit only makes the pursued drive more erratically and was the only reason they drove that way in the first place. (Blaricom Affidavit, Ex. A, ¶ 5(d), pg 9).
18. Officer Smith's intention at the start of the pursuit was to get Willard and Lewis to pull over and stop; that intention did not change at any time during the pursuit.	Disputed and objected to on the grounds it is irrelevant, selfserving evidence of subjective intent. It became obvious shortly after the pursuit began that the motorcycle was not pulling over and stopping. (Van Blaricom depo 60:23-24, 61).
19. As Officer Smith pursued the suspects, he was careful to slow down at intersections and because of this was able to make turns without screeching his tires or losing control of his vehicle.	Disputed. The evidence is overwhelming that Smith lost all control of his vehicle at least at the intersection of Orangevale and Chestnut (Van Blaricom Depo 74-80, e.g.). Otherwise this is only a conclusory uncorroborated self-serving statement by officer Smith which only indicates that Smith must have been going as fast as

	90 mph to make up for this slowing during the pursuit and still maintain an average speed of 60 mph.
20. Officer Smith maintained a distance of approximately 200 plus feet between his patrol vehicle and the fleeing motorcycle.	Disputed. Jeanne Patterson witnessed the patrol car at approximately 100 feet behind the motorcycle (Statement of Jeanne Patterson, Police report pg. 28) and expert Neufeld determines the distance to be between 100 to 150 feet. (Neufeld Declaration Ex. B, ¶ 7, pg 3)
21. Per Sacramento County Sheriff's Department pursuit policy, Officer Smith attempted to notify dispatch of this pursuit and the general direction, but was unable to do so.	It is undisputed that officer Smith did not notify dispatch of his pursuit as required by the Sheriff's Department pursuit policy. For this reason alone officer Smith should have called off the pursuit (Sacramento County Sheriff's Department General Order Section V.; and Smith Depo 66-71). Otherwise Plaintiffs object to these facts as irrelevant and because the cites to Smith's deposition have nothing to do with Smith's notifying dispatch (see Smith's Depo 47:2 and 75:24 - 76:1). (Blaricom Affidavit, Ex. A, ¶ 5, pgs 6-9.)

22. Officer Smith believes he tried to notify them twice and realized both times that he was unsuccessful.	Undisputed. Again this is another reason Smith should have discontinued pursuit (see response to paragraph 21 above).
23. Officer Smith's radio was on the car-to-car channel when he was trying to reach dispatch instead of the dispatch channel.	Undisputed but objected to as irrelevant except to show that officer Smith could not have communicated with dispatch as required by department policy (see response to paragraph 21 above).
24. Willard and Lewis were endangering the public by constantly swerving, using both oncoming and ongoing lanes.	Disputed. It is undisputed that Lewis was a passenger and was endangering no one as he did not have control of the motorcycle. Additionally these "facts" are vague, ambiguous and inflammatory in the use of the words "constantly swerving" and "using both oncoming and ongoing lanes".
25. Witness Peter Berg stated that while he was riding his bicycle that evening, he was forced to jump off his bicycle in order to avoid being hit by the motorcycle.	Plaintiffs object to these facts as entirely unfounded hearsay unsupported by any competent admissible evidence.
26. Berg stated that the motorcycle missed him by approximately 1 to 1-1/2 feet.	Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence.

27. Berg stated that a patrol car with top lights and siren was following behind the motorcycle at approximately 100 yards.	Disputed and Plaintiffs object to these facts as entirely unfounded hearsay unsupported by any competent admissible evidence.
28. Willard and Lewis went over a crest in the road and as Officer Smith went over the crest, he observed the motorcycle trying to make a left turn.	Undisputed except that Smith testified he saw the motorcycle stopping or stopped facing left.
29. As Willard was making a left turn, Officer Smith saw smoke coming from its rear tire and it appeared that the motorcycle just stopped.	Undisputed except that Smith testified he saw the motorcycle stopping or stopped facing left.
30. The driver was either falling off or bailing off the motorcycle.	Plaintiffs object to these facts as irrelevant.
31. The passenger appeared to be either jumping backward or was thrown backward.	Undisputed.
32. The motorcycle brakes locked up when Willard was going to turn.	Undisputed.
33. The motorcycle was going down on its left side without any force or legal intervention from Officer Smith.	Disputed. Defendants own expert Dart clearly indicates that the motorcycle was hit by the patrol vehicle. Willard further stated that "Philip told him to just stop on Orangevale Avenue. He said as he was

	braking, he kind of slid and then the cop hit them sideways and he saw Philip flying." (Statement of Willard; Police report pg. 20). See also (Blaricom Affidavit, Ex. A, ¶ 4, pgs 5-6).
34. Officer Smith started to brake heavily when he noticed the Willard motorcycle was slowing down and continued to brake until he observed Willard and Lewis stopped.	Disputed. Officer Lewis locked his brakes losing all control of his vehicle and skidded approximately 166 feet. (Police report 7-15)
35. Officer Smith let off on his brakes some and began pulling off the right side of the road when he observed a spray of blood and observed the passenger, Lewis, being propelled into the air in front of his patrol car and then saw him roll down the road.	Disputed. Officer Smith's brakes were locked from the time he applied them until he came to rest. (Police report 7-15, Blaricom Affidavit, Ex. A, ¶ 7(f), pg 11)
36. Officers Smith and Stapp never saw a brake light from the motorcycle come on during the pursuit.	Disputed. As to Stapp, Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence. As to Smith, expert Neufeld says the brake light was working properly and this fact

	is further irrelevant since Smith could not see the brake light over the hill anyway (Neufeld Declaration Ex. B, ¶ 9, pgs 3-4.)
37. Brian Willard did not know if the brake light worked or not.	Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence. See also objection to 36 above.
38. Witness Jason Virga stated that he knew the brake light was on all the time when the motorcycle was running.	Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence.
39. Virga thought it was because Willard and Lewis had messed with the fuses.	Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence.
40. CHP Investigating Officer Ronald Snider tested the brake light and found that when the key was turned to the on position, the brake light was on all the time.	Disputed. Expert Neufeld testified that the brake light could not have been on all the time because it cannot be installed upside down as explained by officer Snider. Furthermore, the fact that the brake light was on all the time is irrelevant since Smith could not see the brake light as he was coming over the hill and when he could see the brake light he knew the motorcycle was stopping

	regardless of the condition of the brake light. (Neufeld Declaration Ex. B, ¶ 9, pgs 3-4.)
41. Officer Smith did not feel his car impact anything after he went over the crest and before he came to rest on someone's front lawn.	Plaintiffs object to these facts as irrelevant since it is undisputed that Smith struck and killed Philip Lewis with his patrol car. Furthermore, Smith saw a spray of blood across the front of the car and saw Mr. Lewis rolling down the street. (Smith depo 85:26-28, 86:1-4)
42. A thud sound that Officer Smith heard over his siren did not sound like he hit something, but like something hitting asphalt.	Plaintiffs object to these facts as irrelevant. It is undisputed that Smith struck and killed Philip Lewis. Inclusion of this obviously erroneous "fact" in this motion is a sick defense ploy made for no known reason.
43. When the pursuit ended, Officer Smith was off the road and his patrol car was on someone's front lawn.	Undisputed.
44. After approaching Lewis, Officer Smith observed no signs of life and he requested life-flight and advised dispatch of his pursuit.	Undisputed.

45. Officer Smith has been a Sacramento County Sheriff's Deputy for approximately 20 years and has had training in controlling high speed chases in advanced officer's school.	Disputed. Smith by his own testimony has *never* had any EVOC or equivalent training in high speed chases where "one car chases the other car." The only training which Smith had was in controlling his car during braking and skids and that training was way back in 1976 and 1979 and was not in conducting a high speed chase of another vehicle. (Smith depo 105:12-25; Blaricom Affidavit, Ex. A, ¶ 8(e), pg 13.)
46. Officer Smith never observed the driver of the motorcycle again as he had fled on foot.	Plaintiffs object to these facts as irrelevant.
47. After extensive investigation, Officer Snider concluded that the patrol car never made contact with the motorcycle and there is not evidence of any legal intervention.	Disputed. Even defendants own expert Stephenson indicates that it is unquestionable that the patrol car hit the motorcycle and expert Blaricom concludes the same. Additionally, witnesses Brian Willard, Jeanne Patterson, Orin Ehringer and Jeffrey Sayles state that the patrol car struck the motorcycle. (Police report 20, 28, 29 and 31; Blaricom Affidavit, Ex. A, ¶ 4 pgs 5-6.)

48. There was no evidence to lead CHP Officer Snider to conclude that Officer Smith should have broken off the pursuit.

Disputed and irrelevant as to what officer Snider "concluded". The pursuit should have been broken off immediately upon discovering that no contact could be made with dispatch as required by department policy; it should never have been initiated since there was no known violation of law committed to begin with; and the pursuit should have been discontinued at least by the time Willard ran the stop sign. (Blaricom Affidavit, Ex. A, ¶ 5, pgs 6-9.)

49. Plaintiff's expert, D.P. Van Blaricom, agreed in deposition that after Willard and Lewis committed two infractions beyond the failure to yield to Officer Stapp which was observed by Officer Smith, Officer Smith had the right to pull the two motorcyclists over.

Disputed and Plaintiffs object to these "facts" as not being facts, are irrelevant and are misstated. D.P. Van Blaricom stated that after the boys committed two infractions beyond the failure to yield to Stapp's command. (D.P. Van Blaricom depo 59:10-22). Furthermore, Officer Smith had no objective reason to believe Officer Stapp had commanded them to stop or pull over in the first place. Smith pursued them for no objectively [sic] reason whatsoever. (Smith depo 54:13-28, 55:1-4; Blaricom Affidavit, Ex. A, ¶ 5(c), pg 8).

50. The tire pressure in the tires was not properly inflated, thus greatly affecting the stability of the motorcycle.

Plaintiffs object to these facts as irrelevant. These facts could only go to a comparative negligence defense which is not an issue in this motion or in a 1983 action.

51. Lewis died entirely as a result of Brian Willard's actions.

Disputed and ridiculous. Plaintiffs further object to this "contention" on the basis that it is a legal conclusion, inadmissible hearsay, an ultimate determination to be made by the jury. It is disputed on the basis that it is belied by all the evidence, by common sense and by reality and at least by plaintiffs expert (D.P. Van Blaricom depo 52:22-24; 60:23-24; 65-67; 74:2-21; 75-79; 80-92; (Blaricom Affidavit, Ex. A, ¶ 11, pgs 14-15).

52. Brian Willard was charged with the following: evading arrest resulting in death pursuant to Vehicle Code § 2800.3; making an unsafe turning movement pursuant to Vehicle Code § 22107; defective brake light pursuant to Vehicle

Plaintiffs object to these facts as entirely irrelevant unfounded hearsay unsupported by any competent admissible evidence.

Code §24603(f); felony hit and run pursuant to Vehicle Code § 20001; and Penal Code § 192.1, manslaughter with gross negligence.

53. The police pursuit was conducted appropriately; the Sacramento County Sheriff's Department general order does meet and properly exceed the requirements of Vehicle Code §17004; there was no legal intervention, and Officer Smith's training meets the minimum standards required in the State of California as it relates to vehicle operation and hot pursuits.

Disputed. The police pursuit was not conducted appropriately. (D.P. Van Blaricom depo 52:22-24; 60:23-24; 65-67; 74:2-21; 75-79; 80-92; (Blaricom Affidavit, Ex. A, ¶ 5, pgs 6-9.)

Undisputed that General Order meets the requirements of Vehicle Code §17004 except that it has no provisions for motorcycle or similar pursuit.

Disputed whether there was intervention. Witnesses Brian Willard, Jeanne Patterson, Orin Ehringer and Jeffrey Sayles state that the patrol car struck the motorcycle. (Police report 20, 28, 29 and 31; Blaricom Affidavit, Ex. A, ¶ 4, pgs 5-6.)

Disputed. Officer Smith's training was inadequate and non existent with regard [sic] high speed pursuits. (Smith depo 105:12-25; (Blaricom Affidavit, Ex. A, ¶ 8, pgs 12-13.)

54. Officer Smith never lost control of his patrol car.

Disputed. It is undisputed that officer Smith lost total control of his automobile. (D.P. Van Blaricom depo 74-75:1-22; Blaricom Affidavit, Ex. A, ¶ 7(f), (g), pgs 11-12.)

ADDITIONAL FACTS	CITATION
1. Deputy Smith struck and killed Philip Lewis.	Blaricom Affidavit, Ex. A, ¶ 3, pg 3-5; Neufeld Declaration Ex. B, ¶ 13, pg 5.
2. Deputy Smith rammed the motorcycle.	Blaricom Affidavit, Ex. A, ¶ 4, pg 5-6.
3. Deputy Smith's pursuit violated department pursuit policy.	Blaricom Affidavit, Ex. A, ¶ 5, pg 6-9.
4. Deputy Smith violated the California Vehicle Code in conducting his pursuit.	Blaricom Affidavit, Ex. A, ¶ 6, pg 9.
4. Deputy Smith was deliberately indifferent to the safety of the decedent Philip Lewis.	Blaricom Affidavit, Ex. A, ¶ 7, pgs 9-12.
5. The Sacramento County Sheriff's Department was deliberately indifferent to training Smith in pursuit.	Blaricom Affidavit, Ex. A, ¶ 8, pgs 12-13.
6. Smith was negligently supervised.	Blaricom Affidavit, Ex. A, ¶ 9, pgs 13-14.

7. It is the actual custom and policy of the Sacramento County Sheriff's Department to violate their pursuit policy.	Blaricom Affidavit, Ex. A, ¶ 10, pg 14.
8. Proximate cause of Philip Lewis' death was (a) Sheriff's Department custom and policy to engage in pursuits that violate their own standard of care; (b) their deliberate indifference to the training of defendant Smith in pursuits; and (c) defendant Smith's reckless operation of his vehicle during this pursuit.	Blaricom Affidavit, Ex. A, ¶ 11, pgs 14-15.
9. On May 22, 1990 deputy Smith struck and killed Philip Lewis during a nighttime high speed chase of a motorcycle driven by Brian Willard.	Neufeld Affidavit, Ex. B, ¶ 5, pg 2.
10. During the chase deputy Smith reached speeds of 100 mph in a 30 mph zone.	Neufeld Affidavit, Ex. B, ¶ 6, pg 2.
11. Deputy Smith was following the motorcycle at distances as close as 100 feet in egregious violation of the California Vehicle Code.	Neufeld Affidavit, Ex. B, ¶ 7, pg 3.

12. Deputy Smith was recklessly travelling at speeds in excess of his ability to stop for likely obstacles or circumstances, specifically within 100 feet of a motorcycle with a helpless passenger without even a helmet or seatbelt at speeds that would have taken deputy Smith over 650 feet total within which to stop.	Neufeld Affidavit, Ex. B, ¶ 8, pg 3.
13. Deputy Smith was travelling in excess of his ability to see ahead, especially with the blind crest in the road over which he could not see the motorcycle stopping or any brake light which was not, and could not, have been malfunctioning.	Neufeld Affidavit, Ex. B, ¶ 9, pg 3-4.
14. Deputy Smith was aware of the crest in the road as he chased the motorcycle.	Neufeld Affidavit, Ex. B, ¶ 10, pg 4.
15. Deputy Smith was aware the [sic] there was a passenger on the back of the motorcycle who was not in control of the motorcycle and that neither person on the motorcycle was even wearing a helmet.	Neufeld Affidavit, Ex. B, ¶ 11, pg 4-5.

16. Upon impact by the 4000 pound patrol vehicle travelling almost 40 mph at impact, virtually every major organ in Philip Lewis' 16 year old body was ruptured, he was hurled almost 70 feet down the road fracturing his skull as he tumbled and causing his death.

Neufeld Affidavit, Ex. B, ¶ 13, pg 5.

DATED: February 8, 1993.

KANANACK,
MURGATROYD & BAUM

/s/ Paul J. Hedlund
PAUL J. HEDLUND, ESQ.
Attorneys for Plaintiffs

Law Offices Of
Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(916) 929-1481

TERENCE J. CASSIDY – #99180
(0068:0281)

ATTORNEYS FOR: Defendants
COUNTY OF SACRAMENTO,
SACRAMENTO COUNTY SHERIFF'S DEPARTMENT,
and JAMES EVERETT SMITH

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TERI LEWIS and THOMAS LEWIS Personal Representative of the Estate of PHILIP LEWIS, Plaintiffs, vs. COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFFS DEPARTMENT, THE STATE OF CALIFORNIA and JAMES EVERETT SMITH, DOES 1-100, Defendants. _____/	No. Civ. S-91-505 GEB/ GGH DEFENDANTS COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH REPLY BRIEF IN SUPPORT OF MOTION FOR TOTAL OR PARTIAL SUMMARY JUDGMENT DATE: February 22, 1993 TIME: 9:00 a.m. DEPT: GEB TRIAL DATE: May 18, 1993

Defendants COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERETT SMITH hereby submit the following reply brief in support of their Motion for Total or Partial Summary Judgment.

I.

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFFS' FIRST CAUSE OF ACTION AS A MATTER OF LAW

In opposition to summary judgment with respect to the claimed violation of the Fourteenth Amendment, plaintiffs rely upon *Fargo v. City of San Juan Bautista*, 857 Fed.2d 638 (9th Cir. 1988), for the proposition that conduct constituting gross negligence gives rise to a violation of due process. Defendants respectfully submit, however, that the level of conduct that gives rise to a claim for violation of due process under the Fourteenth Amendment is deliberate indifference. *See Canton v. Harris* 489 U.S. 378, 388 (1989), e.g. *Davis v. Mason County*, 927 F.2d 1473, 1481-82 (9th Cir. 1991). Deliberate indifference has been defined as disregarding a substantial risk that a wrongful act may occur which the actor is aware, or which is so obvious that he must have been aware of it, and his disregard that risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. *Davis*, 927 F.2nd at 1482. Moreover, deliberate indifference involves a state of mind component requiring a conscious disregard of rights. *Fargo* at 642 n.7.

Defendants further submit that the court must initially determine whether the evidence in this case is sufficient to support a finding that the conduct of Officer Smith constituted deliberate indifference to the rights of the decedent. The undisputed facts in this case do not support a finding that Officer Smith acted with deliberate indifference. There is no evidence that the patrol unit operated by Officer Smith was tailgating the motorcycle or that he acted in a manner so indifferent during the course of the pursuit that this accident could have been expected or intended. Officer Smith merely intended that the motorcycle pull over and stop, he was careful to slow down at intersections and maintained a reasonable distance of approximately 200 feet between his patrol vehicle and the fleeing motorcycle. Officer Smith immediately applied his brakes upon observing the motorcycle slow down and did not attempt legal intervention or ramming the motorcycle. Rather, this was an accident which did not involve a conscious disregard of rights or conduct that was brutal, inhumane or shocks the conscience.

It should be noted that the fact that the patrol unit may have struck the motorcycle and that it did strike decedent Lewis is irrelevant to whether Officer Smith acted with deliberate indifference. The evidence establishes that the accident was unexpected in that Mr. Willard attempted to turn west onto Orangevale Avenue when the motorcycle started to slide since the tire was locked up. See Statement of Brian Willard attached as exhibit "D" to defendants' Motion for Total or Partial Summary Judgment. Once again, it is undisputed that immediately upon observing that condition of the motorcycle, Officer Smith applied the brakes in the patrol unit.

Moreover, Officer Smith would not have been able to tell when the fleeing suspects applied the brakes to the motorcycle since the brake light was not working and the motorcycle did not commence its skid or slide until the fleeing suspects were attempting to make the left turn onto Orangevale Avenue, which was after they had gone up and over a rise which caused Officer Smith to loose sight of them. Based upon those undisputed facts, defendants respectfully submit that the conduct of Officer Smith is not such that he disregarded a substantial risk that a wrongful act may occur or that the risk was so obvious that he must have been aware of it, nor did he disregard a risk in a fashion that was gross deviation from conduct that a reasonable person would exercise in the same situation. Therefore, his conduct could not give rise to a finding of deliberate indifference as a matter of law.

On that basis, defendants respectfully request that the court enter a summary judgment dismissing plaintiffs' First Cause of Action as a matter of law.

Plaintiffs now apparently argue that they have asserted a claim under the Fourth Amendment. As indicated in the Motion for Total or Partial Summary Judgment, however, defendants respectfully submit that the Complaint only states a claim under the Fourteenth Amendment. Despite the attempts by plaintiffs to assert a claim under the Fourth Amendment, defendants respectfully request that the attempted assertion of a claim under the Fourth Amendment be stricken as not having been pled or previously asserted in this case.

Assuming arguendo plaintiffs are permitted to assert a claim under the Fourth Amendment, plaintiffs have clearly failed to meet their burden of coming forward with sufficient evidence to support a finding of a seizure within the meaning of the Fourth Amendment. The Supreme Court in *Brower* held that an officer must intentionally apply the instrumentality that results in the suspects apprehension. *Brower v. County of Inyo*, 489 U.S. 593, 596-600 (1989). In each of the examples involving a seizure, the officer intended to utilize the particular instrumentality employed to effect the apprehension of the suspect. Plaintiffs argue that the sideswipe of a patrol unit with the suspect's car causing it to go off the road is the example which is most similar to the facts in this case. Defendants submit that the only logical interpretation of the sideswipe producing the crash as referred to in *Brower* was an intentional sideswipe meant to force the vehicle off the road. As such, in light of the fact Officer Smith did not intentionally use his patrol car as the instrumentality to effect the apprehension, that example does not apply in this case.

The undisputed facts in this case lead to the conclusion that there was no seizure within the meaning of the Fourth Amendment. In fact, the example in *Brower* is more closely akin to the facts in this case that in which suspect looses [sic] control of his vehicle and is stopped by the subsequent crash. Here, as in that example, the evidence demonstrates that Office Smith merely sought to display a show of authority by flashing lights, siren and continuing the pursuit. At no time did Officer Smith set the patrol car in motion in order to achieve the result of contacting either the motorcycle or decedent Lewis.

In addition, plaintiffs assert that use of deadly force to apprehend a passenger on a speeding motorcycle would be unreasonable in that it was disproportionate to the need for the use of force. This argument in itself demonstrates why the facts of this case did not give rise to a seizure. This is due to the fact that there was no application of force in this case as contemplated by the Fourth Amendment. Defendants submit that the court should not attempt to extrapolate whether there was force used within the meaning of the Fourth Amendment in connection with the observation of the motorcycle in a locked skid-slide wherein an officer applies brakes in a pursuing patrol unit.

For all of those reasons, defendants respectfully submit that plaintiffs' First Cause of Action, whether based on the Fourteenth or Fourth Amendment, should be dismissed on the grounds that the conduct complained of does not give rise to a violation of a constitutional right as a matter of law.

II.

DEFENDANT OFFICER SMITH IS ENTITLED TO THE GOOD FAITH QUALIFIED IMMUNITY

Defendants agree that there is a distinction between a governmental employee sued in their individual capacity or official capacity in relation to application of the good faith qualified immunity. *Kentucky v. Graham* 473 U.S. 159, 165-66 (1985). In this case, however, defendants were unable to discern whether Officer Smith was being sued in his individual capacity, his official capacity, or both. *See* complaint filed March 11, 1991 at paras. 6, 7 and 29.

Based on a review of those paragraphs in the Complaint, defendants respectfully submit that Officer Smith is only being sued in his official capacity. Defendants are willing to accept that interpretation of the Complaint and assuming that interpretation is accepted by the Court, will withdraw the assertion of the good faith qualified immunity.

Assuming arguendo plaintiffs have asserted a claim against Officer Smith in his individual capacity, then Officer Smith is entitled to the good faith qualified immunity. *See Hunter v. Bryant*, 112 S.Ct. 534 (1991). The first issue is whether the law regarding pursuits was clearly established at the time of the pursuit in this case on May 22, 1990. There is no question that the law regarding a seizure under the Fourth Amendment in the context of a pursuit was clearly established at that time. *Brower v. County of Inyo, supra*. At the same time, however, defendants respectfully submit that the law was not clearly established with respect to alleged violation of due process under the Fourteenth Amendment in the context of a pursuit. In fact, there remains no case in the 9th Circuit that clearly defines the legal standard for an alleged violation of due process under the Fourteenth Amendment which involves a pursuit. That uncertainty is exemplified by the assertion by plaintiffs of the *Fargo* case as setting forth a legal standard of gross negligence. Since reasonable minds can obviously differ regarding that legal standard, and the lack of any specific case law involving analysis of the due process clause under the Fourteenth Amendment in a pursuit by either the 9th Circuit or the United States Supreme Court, defendants

respectfully request that the Court grant summary judgment in favor of Officer Smith based upon the good faith qualified immunity in relation to claims under the Fourteenth Amendment on the grounds that the law was not clearly established at the time of the pursuit.

The second issue is whether Officer Smith acted reasonably under settled law in the circumstances. Even those law enforcement officials who reasonably but mistakenly conclude probable cause is present are entitled to the immunity. In light of *Hunter*, the question of whether Officer Smith acted reasonably is no longer simply a question for the jury but must be determined by the Court. Assuming arguendo plaintiffs have asserted a claim under the Fourth Amendment, there is no question that Officer Smith acted reasonably under settled law in the circumstances. This is particularly true in light of the fact that Officer Smith did not cause a seizure of decedent Lewis within the meaning of the Fourth Amendment as more fully set forth above. The undisputed facts known to Officer Smith included failure of the fleeing suspects to yield to a red light and siren, the motorcycle was being operated at a high rate of speed, the motorcycle caused other cars to swerve onto the shoulder of the road, the motorcycle was driving on the wrong side of the street, and that Officer Smith's only intention was to pull over and stop the fleeing suspects and that intention did not change at any time during the pursuit. Officer Smith slowed at intersections and maintained a distance of approximately 200 feet behind the motorcycle. There is no evidence that Officer Smith attempted to forcibly ram his patrol unit into the motorcycle by using what is referred to as legal intervention, nor did he set his patrol unit in

motion in a manner which would achieve the result that occurred. Based on those facts, defendants respectfully submit that Officer Smith had a reasonable belief of the right to pursue the fleeing suspects, the right to continue the pursuit of those suspects and that he was not attempting to effect a seizure of those fleeing suspects. Thus, assuming plaintiffs may assert a claim under the Fourth Amendment, Officer Smith is entitled to the good faith qualified immunity with respect to that claim as a matter of law.

Defendants also submit that the same factual analysis would apply for the Court to determine whether Officer Smith is entitled to the good faith qualified immunity in relation to the alleged violation of due process. Assuming well settled law defined a violation of due process in the context of a pursuit based upon conduct of gross negligence or deliberate indifference, a reasonable officer in the position of Officer Smith would have believed that his conduct was not sufficient to give rise to a finding of gross negligence of deliberate indifference. Thus, defendants respectfully request that the Court grant summary judgment in favor of Officer Smith with respect to plaintiffs' claim under the Fourteenth Amendment.

III.

PLAINTIFFS HAVE FAILED TO ESTABLISH A MONELL TYPE CLAIM

The only apparent basis for a Monell type claim against the County of Sacramento and the Sacramento County Sheriff's Department is an alleged failure to train its officers. In opposition to the Motion for Summary

Judgment on that issue, however, plaintiffs have failed to overcome the holding in *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 2436 (1985). That is, plaintiffs have failed to show more than alleged isolated incident of an improper pursuit. Moreover, plaintiffs have failed to offer any evidence that there exists a policy of inadequately trained police officers. The only training referred to is that of Officer Smith. Plaintiffs rely entirely upon the fact that Officer Smith did not have specific training regarding high speed pursuits in attempting to raise a question of fact regarding whether there was a policy of inadequate training regarding pursuits.

Defendants have concurrently filed a Motion to Strike the Affidavit of Plaintiffs' Expert D.P. Van Blaricom. In the event that motion is not granted, then it is interesting to note that plaintiffs' own expert does not state that California Peace Officer Standards and Training require certain training regarding pursuits. This is due to the fact that there is no such requirement. Thus, this case is distinguishable from *Davis v. Macon County* in that Officer Smith did not fail to receive the training required by State law. In fact, Officer Smith had all of the state mandated training, including training in high speed driving. The mere fact that other training may be available, such as emergency vehicle operation course training, is not sufficent to establish the type of deliberate indiffence the training envisioned by the Supreme Court in the *City of Canton* case. That is, plaintiffs have failed to submit sufficient evidence to meet their burden of proof that the need for more or different training was so obvious and the inadequacy was so likely to result in the violation of constitutional rights that the policy makers of the County

of Sacramento can be said to have been deliberately indifferent to that need. Furthermore, there is no evidence of violations of constitutional rights in other instances involving pursuits by the Sacramento Sheriff's Department which would in any manner evidence a need for more or different training which would support a finding of deliberate indifference. Thus, plaintiffs have offered no more than a speculative opinion that Officer Smith may have avoided the subject accident if he had better or more training which is clearly insufficient to give rise to deliberate indifference. *City of Canton* 489 U.S. at 390.

For all of those reasons, defendants respecfully request that the Court grant summary judgment in favor or the County of Sacramento and the Sacramento County Sheriff's Department with respect to plaintiffs' Second Cause of Action based upon a Monell type claim for failure to adequately train officers on the grounds that plaintiffs have failed to meet their burden of proof to support a finding of deliberate indifference on the part of the official policy makers of the County of Sacramento in failing to adequaately [sic] train its officers.

IV.

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFFS' THIRD CAUSE OF ACTION PURSUANT TO CALIFORNIA GOVERNMENT CODE § 845.8(b) AND CALIFORNIA VEHICLE CODE §§ 17004 AND 17004.7

First, plaintiffs have failed to provide any legally cognizable basis to oppose the granting of summary judgment on behalf of Officer Smith pursuant to Vehicle Code § 17004 with respect to plaintiffs' Third Cause of Action.

Remarkably, the very case relied upon by plaintiffs, *Brummet v. County of Sacramento*, 21 Cal.3d 880 at 883 (1978), specifically upheld the dismissal of peace officers engaged in the pursuit of a fleeing suspect based upon their immunity from liability pursuant to California Vehicle Code § 17004. Thus, there is no question that Officer Smith is entitled to summary judgment dismissing plaintiffs' Third Cause of Action against him as a matter of law based upon Vehicle Code § 17004.

Defendants COUNTY OF SACRAMENTO and SACRAMENTO COUNTY SHERIFF'S DEPARTMENT are also entitled to summary judgment dismissing plaintiffs' Third Cause of Action based upon the immunities set forth in California Government Code § 845.8(b) and California Vehicle Code § 17004.7. Defendants respectfully submit that the *Hooper* court correctly interpreted § 845.8 (which was enacted subsequent to California Vehicle Code § 17001) as a limitation on the broad notion that a governmental agency can be held liable for the negligent conduct of its employees in the operation of a motor vehicle. *Hooper v. City of Chula Vista*, 212 Cal.App. 3d 442, 450 (1989). The *Hooper* case is also distinguishable from the *Brummet* case, also relied upon by plaintiffs to overcome application of Government Code § 845.8. First, the *Brummet* court did not address the question of the scope of the statutory immunity which was specifically at issue in *Hooper* and the case at bar. Moreover, *Brummet* involved an injury to an innocent third party who was in no way involved in the police pursuit. *Hooper*, 212 Cal.App.3d at 455 N.12.

It is also important to note that none of the previous California decisions dealing with statutory immunity

involved facts in which a suspect fleeing from the police was the injured party bringing suit. *Id.* at 449 N.8. Recognizing that the other cases dealt with injuries to innocent and uninvolved third parties, the *Hooper* court interpreted the scope of the immunity in Government Code § 845.8(b) to shield peace officers from liability for injuries to a fleeing suspect arising out of a pursuit that was necessitated by the suspect's own conduct. This is precisely what occurred based upon the undisputed facts in this case. While plaintiffs argue that decedent Lewis was a "hapless passenger", the undisputed evidence is to the contrary. As set forth in the statement of Brian Willard, there is no question that decedent Lewis told Willard to keep going when they went by two cops. The motorcycle being operated by Willard was owned by decedent Lewis and it is thus apparent that he directed Willard to flee from the officers. It is thus undisputed that decedent Lewis was himself a fleeing suspect and therefore his conduct falls within the immunity in Government Code § 845.8(b) as interpreted by the *Hooper* court. On that basis, defendant COUNTY OF SACRAMENTO and the SACRAMENTO COUNTY SHERIFF'S DEPARTMENT respectfully request that the Court grant summary judgment dismissing plaintiffs' Third Cause of Action against them based upon Government Code § 845.8(b).

In addition, defendants COUNTY OF SACRAMENTO and SACRAMENTO COUNTY SHERIFF'S DEPARTMENT are also entitled to immunity from plaintiffs' Third Cause of Action based upon Vehicle Code § 17004.7. It is undisputed that the written policy of the Sacramento County Sheriff's Department regarding pursuits complies with the provisions of California Vehicle

Code § 17004.7. *See* Defendants' Statement of Undisputed Material Facts No. 53. As such, the only issue is whether the dead of Philip Lewis resulted from the collision of the vehicle being operated by an actual or suspected violator of the law who was being pursued by a peace officer. It is also undisputed that the California Highway Patrol found Brian Willard responsible for the subject accident and he was charged with numerous Vehicle Code violations and manslaughter with gross negligence. *Id.* at No. 51-52. Although defendants were unable to locate any specific case law on this issue, it seems that the death of Mr. Lewis resulted from a collision between the motorcycle being operated by Mr. Willard as an actual or suspected violator of the law who was being pursued by Peace Officer Smith. As indicated in the *Hooper* case, the legislative history of Vehicle Code § 17004.7 anticipated instances in which suspects sought to recover from public entities for injuries incurred during a pursuit and the legislature specifically intended to shield public employers from liability so long as they adopt safe pursuit guidelines. In this case not only was the death of Mr. Lewis caused by collision with the vehicle operated by suspect Willard, but Mr. Lewis was himself a fleeing suspect who directed Mr. Willard to keep going and therefore is the type of suspect the legislature intended to prevent from recovering damages for injuries incurred during a pursuit in Vehicle Code § 17004.7. For each of those reasons, defendants also respectfully request that the Court grant summary judgment dismissing plaintiffs' Third Cause of Action pursuant to Vehicle Code § 17004.7.

V.
CONCLUSION

Based on the foregoing, defendants COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERTT SMITH respectfully request that the Court grant defendants Motion for Total or Partial Summary Judgment.

Dated: February 17, 1993

Respectfully submitted,

PORTER, SCOTT,
WEIBERG & DELEHANT
A Professional Corporation

By /s/ Terence J. Cassidy
TERENCE J.
CASSIDY

PROOF OF SERVICE BY MAIL (C.C.P SECTION 1013a[3])

I am over the age of 18 years and not a party to the within action; my business address is, and I am employed at Porter, Scott, Weiberg & Delehant, 350 University Avenue, Suite 200, Sacramento, CA 95825.

On February 17, 1993, I served the following document(s) on the person(s) listed below by:

[X] Placing a true copy, enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Sacramento, California.

[ ] Placing a true copy, enclosed in a sealed envelope for collection and mailing on the date at the business address shown above following our ordinary business

practices. I am readily familiar with this business' practice for collection and process of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

[ ] Via facsimile machine to place of business.

DOCUMENT(S) SERVED:

ADDRESSED AS FOLLOWS:

Paul J. Hedlund, Esq.
KANANACK, MURGATROYD & BAUM
12100 Wilshire Blvd., Suite 650
Los Angeles, CA 90025
(310) 207-3233
FAX: (310) 820-7444

I declare under penalty of perjury the foregoing is true and correct.

Executed at Sacramento, California, on February 17, 1993.

/s/ Kathy Dorio
Kathy Dorio

Supreme Court, U.S.
FILED
AUG 8 1997
CLERK

No. 96-1337

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

TERENCE J. CASSIDY*
MARCOS A. KROPF
PORTER, SCOTT, WEIBERG & DELEHANT
350 University Avenue, Suite 200
Sacramento, CA 95825
Telephone: (916) 929-1481
Attorney for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

54 pp

QUESTIONS PRESENTED

I. Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment is "shocks the conscience" as determined by this Court in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115 (1992) and other Circuit Court cases or is "deliberate indifference" or "reckless disregard" as determined by the Ninth Circuit in this case.

II. Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment was clearly established for the purpose of granting qualified immunity to a peace officer when there is a conflict in that legal standard between the decision by this Court in *Collins* and by other Circuit Courts of Appeal requiring conduct that "shocks the conscience" and the holding by the Ninth Circuit in this case that the conduct be "deliberately indifferent."

III. Whether a peace officer involved in a police pursuit is entitled to qualified immunity when a reasonable officer could not have known he may be violating the law due to conflicting legal standards of conduct and where the factual contours of the legal standard are not sufficiently defined.

LIST OF PARTIES

The caption in this case contains the names of all the parties.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE 2

STATEMENT OF THE CASE 3

1. Facts Giving Rise to this Case 3
2. The Initial Proceedings 7
3. The Appeal 8

SUMMARY OF ARGUMENT 9

ARGUMENT 12

THE MINIMUM CONDUCT NECESSARY TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IN A POLICE PURSUIT SHOULD BE CONDUCT THAT IS "ARBITRARY" OR "SHOCKS THE CONSCIENCE" 12

1. *Collins* Established That The "Arbitrary" or "Shocks The Conscience" Standard Is Applicable to Creation of Danger Cases 13
2. Various Circuits Have Properly Applied The "Shocks the Conscience" Standard In Police Cases 17

TABLE OF CONTENTS – Continued

Page

3. The More Restrictive Standard of "Shocks the Conscience" Provides An Appropriate Balance with The Governmental Interest in Promoting Effective Law Enforcement 20

4. Adoption of The "Deliberate Indifference" Standard Would Make the Fourteenth Amendment a Font of Tort Law..... 24

5. No Constitutional Violation Occurred in This Case..... 26

DEPUTY SMITH IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW CONCERNING SUBSTANTIVE DUE PROCESS IN THE CONTEXT OF A POLICE PURSUIT WAS NOT CLEARLY ESTABLISHED AND A REASONABLE OFFICER COULD NOT HAVE KNOWN HE WAS VIOLATING THE LAW..... 27

1. The Law Concerning Substantive Due Process Violations in the Context of a Police Pursuit Was Not Clearly Established in May, 1990.... 28

2. Qualified Immunity is Appropriate Where the Law is Not Sufficiently Factually Defined 32

3. A Reasonable Officer Could Not Have Known That This Pursuit Would Violate Clearly Established Law 44

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 28, 29

Bank of Columbia v. Okely, 4 Wheat. (17 U.S.) 235 (1819) 13

Boveri v. Town of Saugus, 113 F.3d 4 (1st Cir. 1997) 17, 30, 42, 43

Britt v. Little Rock Police Dep't, 721 F. Supp. 189 (E.D. Ark. 1989) 33, 38, 40

Brower v. County of Inyo, 489 U.S. 593 (1989).... 12, 33, 34

Campbell v. White, 916 F.2d 421 (7th Cir. 1990)..... 31

Cannon v. Taylor, 782 F.2d 947 (11th Cir. 1986)....31, 44

Carrol v. Burrough of State College, 854 F. Supp. 1184 (C.D. Pa. 1994), *affirmed*, 47 F.3d 1160 (3d Cir. 1996) 30

Checki v. Webb, 785 F.2d 534 (5th Cir. 1986)..... *passim*

City of Canton v. Harris, 489 U.S. 378 (1989).. 10, 15, 16

City of Los Angeles v. Heller, 475 U.S. 796 (1986)..... 16

Collins v. City of Harker Heights, Tex., 503 U.S. 115 (1992) ..... *passim*

Corbin v. City of Springfield, 942 F. Supp. 721 (D.Mass. 1996)..... 40

Daniels v. Williams, 474 U.S. 327 (1986)..... 13, 14, 24

Davidson v. Cannon, 474 U.S. 344 (1986) 13

Davis v. Sherer, 468 U.S. 183 (1984)..... 28

DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189..... 13

TABLE OF AUTHORITIES – Continued

Page

Easterling v. City of Glennville, 694 F. Supp. 911 (S.D. Ga. 1986) 38, 40

Estate of Story through McNair v. McDuffie County, 929 F. Supp. 1523 (S.D. Ga. 1996) 31

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996), *cert. denied, sub nom* by *Evans v. Avery*, 117 S.Ct. 1693 (1997), *reh'g denied*, 138 L.Ed.2d 1032, 1997 U.S. Lexis 4222 (1997) 17, 19, 20, 22, 42, 43

Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994) 18, 30, 42

Foy v. City of Berea, 58 F.3d 227 (6th Cir. 1995) 18

Frye v. Town of Akron, 759 F. Supp. 1320 (N.D. Ind. 1991) 33, 34

Fulkerson v. City of Lancaster, 801 F. Supp. 1476 (E.D. Pa. 1992) 41

Galas v. McKee, 801 F.2d 200 (6th Cir. 1986) 22, 23

Graham v. Conner, 490 U.S. 386 (1989) 22

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 28, 29, 44

Hicks v. Leake, 821 F. Supp. 419 (W.D. Va. 1992) .. 30, 41

Hunter v. Bryant, 503 U.S. 224 (1991) 28, 29, 32

Hurtatado v. California, 110 U.S. 516 (1884) 13

Johnson v. Glick, 481 F.2d 1028 (2nd Cir.) (Friendly, J.), *cert. denied, sub nom, John v. Johnson*, 414 U.S. 1033 (1973) 21

Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987) .... *passim*

L.W. v. Grubbs, 92 F.3d 894 (9th Cir. 1996) 19

TABLE OF AUTHORITIES – Continued

Page

Lassiter v. Alabama A.N.M Univ., Bd. of Trustees, 28 F.3d 1146 (11th Cir. 1994) 32, 33

Lewellen v. Metropolitan Gov't of Nashville and Davidson County, Tenn., 34 F.3d 345 (6th Cir. 1994) 18

Magdziak v. Bird, 96 F.3d 1045 (7th Cir. 1996) 43

Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mi. 1990) 31

Nishiyama v. Dickson, Tenn., 814 F.2d 277 (6th Cir. 1987) 18

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 12, 16

Onassian v. Block, 95-55837, 1996 U.S. App. Lexis 32781 (9th Cir. Nov. 5 1996) 25

Parton v. City of Bentonville, 901 F. Supp. 1440 (W.D. Ark. 1995) 25

Paul v. Davis, 424 U.S. 693 (1976) 14

Post v. City of Fort Lauderdale, 7 F.3d 1552 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994) 33

Roach v. City of Fredericktown, 882 F.2d 294 (8th Cir. 1989) 31, 34, 35, 40, 44

Singer v. State of Maine, 49 F.3d 837 (1st Cir. 1995) 29

Smith v. Lexington Fayette Irvine County Gov't, 884 F. Supp. 1086 (E.D. Ky. 1995) 30, 40

Smoot v. City of Placentia, 950 F. Supp. 282 (C.D. Ca. 1997) 25

Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Tennessee v. Garner, 471 U.S. 1 (1985) 33, 34

Torres v. Bonnilla, 95-55875, 1996 U.S. App. Lexis 32765 (9th Cir. Nov. 5 1996) 25

Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 924 (1996) 18, 19

Whitley v. Albers, 475 U.S. 312 (1986) 14, 21

Williams v. City and County of Denver, 99 F.3d 1009 (10th Cir. 1996), *reh'g granted en banc*, (March 3, 1997) 17, 19

Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988), *reh'g granted and opinion modified by*, 879 F.2d 583 (9th Cir. 1989) 15, 16

Wylie v. Doory, 14 F.3d 993 (4th Cir. 1994) 30

STATUTES

28 U.S.C. §1254(1) 2

28 U.S.C. §§1441(a), (b), and (c) 1

42 U.S.C. §1983 ..... *passim*

California Government Code §845.8(b) 8

California Vehicle Code §17004 8

California Vehicle Code §17004.7 8

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir., 1996) and is reprinted in the Appendix to the Petition for Writ of Certiorari, pages 46-60.

The memorandum order of the United States District Court for the Eastern District of California granting summary judgment in this case has not been reported. It is reprinted in the Appendix to the Petition for Writ of Certiorari, pages 1-45.

JURISDICTION

On March 11, 1991, Respondents brought suit against petitioners in the Superior Court of the State of California in and for the County of Sacramento. On April 24, 1991, the suit was removed to the United States District Court for the Eastern District of California pursuant to 28 U.S.C. §§ 1441(a), (b), and (c).

On April 12, 1993, the District Court partially granted petitioner's motion for summary judgment. App. 46.[1] On May 10, 1993, respondents appealed the District Court's Order to the United States Court of Appeals for the Ninth Circuit.

---

[1] Appendix to the Petition for Writ of Certiorari will be designated "App." "J.A." refers to the Joint Appendix. References to the District Court docket record will be designated "D.Ct.".

On October 9, 1996, the Ninth Circuit issued their opinion and judgment affirming in part and reversing in part the District Court's Order. App. 44-45. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing en banc to the Ninth Circuit. The Petition and Suggestion for Rehearing en banc was denied by the Ninth Circuit on November 21, 1996. App. 61.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE

The Fourteenth Amendment to the United States Constitution, Section I provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

1. Facts Giving Rise to this Case

On the evening of May 22, 1990, Sacramento County Sheriff's Deputies JAMES EVERETT SMITH and Murray Stapp responded to a call for service. J.A. 29, 72, 175. Upon completing the call and returning to their marked patrol cars, Deputy Stapp heard an engine revving and saw a motorcycle approaching him at a high rate of speed. *Id.* In attempting to stop the motorcycle by blocking its path, Deputy Stapp pulled his patrol car out from the curb closer to Deputy Smith's car which was parked on the opposite side of the street. J.A. 30, 75, 175. Additionally, he turned on the overhead rotating lights on the patrol vehicle. J.A. 29, 75, 108, 175; Willard Dep. 30, D.Ct. 96.[2] The motorcycle slowed down as it approached the patrol units and Deputy Stapp yelled at the driver to pull over so they could talk. J.A. 29, 72, 75. However, rather

[2] During the course of the lower court proceedings, petitioners were unable to locate suspect Willard in order to obtain his testimony. Defs' Mot. to Take Deposition Pending Appeal, D.Ct. 88. After the District Court's ruling on the motion for summary judgment, petitioners were granted leave to complete the deposition of Willard in order to preserve his testimony. *Id.* The original transcript of that deposition is now part of the District Court record. D.Ct. 96.

than stop and obey the lawful order of a peace officer, the motorcycle maneuvered between the two patrol cars and rapidly fled the scene. J.A. 30, 73, 75; Willard Dep. 31, D.Ct. 96. As it did so, Deputy Stapp heard either the driver or the passenger say, "fuck it, let's get out of here." J.A. 30, 75.

The motorcycle was being driven by Brian Willard with passenger Philip Lewis, who owned the motorcycle, but neither one was licensed to drive it. Willard Dep. 21, D.Ct. 96. Both Lewis and Willard were on probation for a prior charged offense of grand theft auto. *Id.* at 15. According to the terms of their probation, they had been ordered to stay away from each other. J.A. 107; Willard Dep. 17. D.Ct. 96. If stopped together they would be in violation of those terms. *Id.* Prior to fleeing from the deputies, Willard saw the two marked Sheriff's vehicles, Deputy Stapp's attempt to block his path and the activation of the overhead lights on the patrol car. J.A. 108; Willard Dep. 29, 30, D.Ct. 96. Willard heard Deputy Stapp yell something at him, however Lewis yelled at Willard to keep going. *Id.*

Deputy Smith, who was parked on the opposite side of the street, saw and heard Deputy Stapp's obvious attempt to stop the motorcycle. J.A. 72; Smith Dep. 54, D.Ct. 50. Deputy Smith did not know why Deputy Stapp wanted to stop the motorcycle and he could not specifically hear what Stapp had yelled at its passengers. *Id.* However, as the motorcycle maneuvered between their two patrol cars, it was obvious that it had failed to yield to lawful authority in violation of the law.

Based on his observations, Deputy Smith turned on the emergency lights and siren of his patrol car, executed a three point turn and pursued the fleeing suspects. J.A. 72. Immediately upon accelerating away from the deputies, the suspects ran a stop sign and made a 90° turn onto an adjacent street. J.A. 84; Willard Dep. 33, D.Ct. 96. As they continued, the suspects drove in and out of the oncoming lanes of traffic, forcing at least two cars to swerve onto the shoulder in order to avoid crashing into the fleeing motorcycle. J.A. 83-85; Willard Dep. 34-35, D.Ct. 96. Deputy Smith felt that the erratic driving was endangering the public. J.A. 84-85. At one point, a bicyclist on the opposite side of the road had to jump off his bike in order to avoid the motorcycle which narrowly missed him by only 1 to 1½ feet. J.A. 110. The suspects continued to flee by making two more 90° turns onto adjacent streets. J.A. 73, 127-128.

In accordance with Departmental policy, Deputy Smith attempted to contact the dispatcher two times as the pursuit progressed. J.A. 95. However, he was unable to do so because unbeknownst to him, the radio in the patrol car was switched to the wrong frequency. *Id.*

Finally, in an effort to make good their escape, the suspects attempted to make a 90° turn onto a street that had a barrier across the roadway. J.A. 108; Willard Dep. 42-43, D.Ct. 96. There was enough space in the barrier to allow a motorcycle to get through but it would have blocked the patrol unit's path, preventing it from continuing to follow the motorcycle. *Id.* The suspects, however, could not negotiate the turn due to the high speed and poor condition of the motorcycle. J.A. 121-122, 128.

As a result, they locked the brakes of the speeding motorcycle and lost control causing the motorcycle to slide to the ground. J.A. 108-109, 128.

Deputy Smith did not know Lewis or Willard and did not obtain the license plate number of the motorcycle during the pursuit. Smith Dep. 5, 19, 51, 74; D.Ct. 50. The first indication Deputy Smith received that the suspects were trying to slow the motorcycle was when he saw smoke coming from its locked tires. J.A. 91. Throughout the pursuit, neither Deputy Smith nor Deputy Stapp, who was following Deputy Smith, saw any activated brake lights from the suspects' motorcycle. J.A. 74, 76. Realizing that the tires on the motorcycle had locked-up, Deputy Smith immediately applied his brakes. *Id.* At that point, Deputy Smith was traveling approximately three hundred (300) feet behind the motorcycle. J.A. 73; Neufeld Dep. 32, D.Ct. 47; Stephenson Dep. 66, D.Ct. 97. The evidence indicates that either suspect Lewis was ejected into the path of the slowing patrol car or the slowing patrol car collided with the motorcycle resulting in Lewis' death. J.A. 73, 102, 108, 124. Willard got up off the ground and ran away, but was subsequently arrested and convicted of felony hit and run with death or injury. J.A. 107-108; Willard Dep. 9, 44, D.Ct. 96.

The fleeing motorcycle left approximately 147 feet of skid marks. Snider Dep. Exh. "A" at 11, D.Ct. 51. The patrol car left 166 feet of skid marks. *Id.* The pre-braking speed of the patrol car was approximately 60 to 65 miles per hour. Stephenson Dep. 57-58, D.Ct. 97. The pre-braking speed of the fleeing motorcycle was estimated to be as great or greater than that of the patrol car. Stephenson Dep. 92, D.Ct. 97. Willard estimated the speed of the

motorcycle at between 70 and 80 miles per hour. J.A. 108; Willard Dep. 75, D.Ct. 96.

The entire pursuit lasted no more than 70 to 80 seconds, covering a distance of only 1.3 miles. J.A. 87, 240; Smith Dep. 41-43, D.Ct. 50.

2. The Initial Proceedings

On March 11, 1991, respondents brought suit against petitioners in the Superior Court of the State of California in and for the County of Sacramento. J.A. 1. On April 24, 1991, the suit was removed to the United States District Court for the Eastern District of California.

The suit was brought under 42 U.S.C. § 1983 and California State law. The first cause of action alleged that Officer Smith's conduct deprived decedent of his right to substantive due process under Fourteenth Amendment of the U.S. Constitution. J.A. 10. The second cause of action asserted a *Monell*-type claim against the County of Sacramento. J.A. 14. The Third Cause of Action asserted a claim for negligence under state law. J.A. 16.

On November 11, 1992, petitioners moved for total or partial summary judgment. J.A. 19. On April 12, 1993, the District Court appropriately granted petitioner's motion. Pet. App. 59-60. The court found that for the purposes of granting qualified immunity, the law regarding substantive due process under the Fourteenth Amendment in the context of a police pursuit was not clearly established. App. 53. Additionally, the court found that the County of Sacramento adequately trained Officer Smith and did not

have a policy amounting to deliberate indifference necessary for entity liability pursuant to 42 U.S.C. § 1983. App. 56. The District Court also dismissed the negligence claim against Officer Smith based on the immunity in California Vehicle Code § 17004; but declined to rule upon whether the negligence claim against the County of Sacramento is barred by California Vehicle Code § 17004.7, or California Government Code § 845.8(b), and dismissed that claim without prejudice to being refiled in state court. App. 59.

3. The Appeal

On May 10, 1993, plaintiffs filed a notice of appeal from the District Court's Order granting defendant's motion for summary judgment.

On October 9, 1996, the Ninth Circuit issued an opinion and judgment affirming in part and reversing in part the District Court's Order. App. 1-45. The Ninth Circuit found that the minimum standard of conduct necessary for a violation of an individual's substantive due process rights under the Fourteenth Amendment in the context of a police pursuit was either "deliberate indifference" to, or "reckless disregard" for, the person's rights. App. 22. Contrary to the District Court's findings, the Ninth Circuit held that the law concerning substantive due process in the context of a police pursuit was clearly established. App. 35. The Court also stated that a reasonable officer in Officer Smith's position could not have believed that his pursuit of the fleeing suspects was lawful and therefore he was not entitled to qualified immunity. App. 36.

Petitioners then timely filed a petition for rehearing and suggestion for rehearing en banc, which was denied by the Ninth Circuit on November 21, 1996. App. 61.

SUMMARY OF ARGUMENT

This case arises out of an accident which occurred during the course of a police pursuit engaged in by Deputy James Everett Smith of the Sacramento County Sheriff's Department. Respondents seek to turn what may have been an ordinary tort into a violation of the substantive component of the Due Process Clause of the Fourteenth Amendment. The Ninth Circuit Court of Appeals opined that claims involving substantive due process rights should be expanded to include conduct in police pursuits that manifest "deliberate indifference" to, or "reckless disregard" for, a person's right to life, liberty and personal security. To invoke the protections of the Due Process Clause in a police pursuit, however, there must be a showing of intentional abuse of governmental authority which is "arbitrary" or "shocks the conscience." Since the law has remained unsettled in this area, Deputy Smith should be shielded from liability through qualified immunity.

1. The identification of the proper legal standard to establish a violation of the substantive component of the Due Process Clause of the Fourteenth Amendment is necessary in order to determine the threshold issue of whether there was a constitutional violation in this case. Petitioners submit the proper standard of conduct in

determining whether there has been a violation of a substantive due process right in the context of a police pursuit is whether the conduct is "arbitrary" or "shocks the conscience." In reaching its decision that the less restrictive standard of "deliberate indifference" should apply, the Ninth Circuit's opinion failed to consider this court's holding in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992). In *Collins*, this court determined that conduct which is "arbitrary" or "conscience shocking" in a constitutional sense is necessary to establish a violation of substantive due process rights in a case where the state actor has created the danger. The First, Third, Fourth, Fifth, Sixth and Tenth Circuits have properly adopted that standard in creation of danger cases and the First, Third, Fourth and Fifth Circuits have specifically applied that test in police pursuit cases. Additionally, the Ninth Circuit's opinion mistakenly relied upon the legal standard of "deliberate indifference" which applies to municipality liability under § 1983 set forth in *City of Canton v. Harris*, 489 U.S. 378 (1989). The Ninth Circuit's opinion also failed to properly address the various policy considerations which would support the adoption of the "arbitrary" or "shocks the conscience" standard. The "arbitrary" or "shocks the conscience" test is a more restrictive standard that necessarily takes into consideration the governmental interest in promoting effective law enforcement, and the fact that courts should be hesitant to critique decisions made by government officials in dynamic circumstances and this court's policy of rejecting arguments that federal duties should be imposed on activities that are traditionally governed by state tort law. The "deliberate indifference" or "reckless disregard"

standards are also contrary to the well-settled policy against expanding claims under the Due Process Clause, and would effectively create a new federal tort. Once this court determines that respondents must establish that the conduct of Deputy Smith was "arbitrary" or "shocks the conscience," a review of the record when viewed in a light most favorable to respondents leads to the conclusion that no constitutional violation occurred in this case.

2. Deputy Smith is entitled to qualified immunity since the law regarding violations of substantive due process in police pursuit cases was not clearly established in May, 1990, and a reasonable officer in the position of Deputy Smith would not have known he was violating federal law by initiating and continuing to engage in the pursuit in this case. On or before May, 1990, there were conflicting decisions regarding what legal standards should be applied with respect to the minimum conduct necessary to establish a violation of substantive due process in a police pursuit. In addition, the law was not sufficiently factually defined so that a reasonable officer engaged in a pursuit would know that his conduct had crossed a bright constitutional line resulting in the denial of substantive due process rights. Cases involving allegations of excessive speeds, vehicles traveling at unsafe distances, police vehicles failing to use emergency lights and sirens, failing to maintain radio contact, violations of departmental policies and state law, coupled with expert testimony that the conduct was reckless have all resulted in findings that there was no constitutional violation. In view of the conflicting legal standards and the factual guidelines afforded an officer involved in a police pursuit

in May, 1990, a reasonable officer in the position of Deputy Smith would not have known that he was violating federal law by initiating and continuing in the pursuit in this case.

ARGUMENT

I

THE MINIMUM CONDUCT NECESSARY TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IN A POLICE PURSUIT SHOULD BE CONDUCT THAT IS "ARBITRARY" OR "SHOCKS THE CONSCIENCE"

In this case, respondents assert a claim for alleged deprivation of the rights to life, liberty and personal security in violation of the substantive component of the Due Process Clause of the Fourteenth Amendment arising out of a police pursuit.[3] The threshold issue is whether plaintiffs' harm was caused by a constitutional violation. See *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120 (1992) citing *Oklahoma City v. Tuttle*, 471 U.S.

[3] Petitioners use of the term "police pursuit" in this case refers to any vehicle pursuit engaged in by a peace officer in attempting to apprehend a fleeing suspect without any intentional acquisition of physical control over the suspect(s). If a police pursuit involves the intentional termination of freedom of movement, then it constitutes a seizure and must be analyzed under the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593 (1989). Since it is undisputed that Deputy Smith did not intend to hit Lewis or the motorcycle, respondents are not asserting a claim for violation of the Fourth Amendment. App. 10, n.3.

808, 817 (1985). Petitioners respectfully submit that in order for this court to resolve that issue, the court must first resolve the issue of what legal standard of conduct will apply to a police pursuit in order to establish a violation of substantive due process under the Fourteenth Amendment.

1. *Collins* Established That The "Arbitrary" or "Shocks The Conscience" Standard Is Applicable to Creation of Danger Cases.

"[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,' " *Collins v. City of Harker Heights, Tex.*, 503 U.S. at 126, quoting *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196, (quoting *Davidson v. Cannon*, 474 U.S. 344, 348) (1986), and "to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (quoting *Hurtatado v. California*, 110 U.S. 516, 527 (1884)) (quoting *Bank of Columbia v. Okely*, 4 Wheat. (17 U.S.) 235, 244 (1819).

The Due Process Clause has been interpreted as a limitation on the state's power to act and is not to be construed as a guarantee of certain minimal levels of safety and security. *Collins v. City of Harker Heights, Tex.*, 503 U.S. at 126, citing *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. at 195. Thus, actions giving rise to substantive due process rights have been limited to "deliberate decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. at 331, and examples cited therein. This court

traditionally has exercised judicial self-restraint by declining to expand the types of claims which may be asserted as violations of substantive due process. *Collins v. City of Harker Heights, Tex.*, 503 U.S. at 125. The Fourteenth Amendment was not meant to be a font of tort law to be superimposed upon laws already administered by the states. *Daniels v. Williams*, 474 U.S. at 332, citing *Paul v. Davis*, 424 U.S. 693, 701 (1976).

In *Collins*, this court concluded that the legal standard for determining whether there has been a denial of substantive due process is whether the conduct is "arbitrary" or "conscience shocking" in a constitutional sense. 503 U.S. at 128. *Collins* involved alleged unsafe working conditions causing the death of a worker who entered a sewer without adequate ventilation. Those facts are significant for two reasons. First, until the decision in *Collins*, this court had left open the question of what type of conduct would be sufficient to trigger the protections of the Due Process Clause with respect to persons who are enjoying unrestricted liberty. See *Whitley v. Albers*, 475 U.S. 312, 327 (1986) and *Daniels v. Williams*, 474 U.S. at 334, n.3. Since petitioner's decedent in *Collins* was a municipal employee, this court had now addressed the substantive due process rights of an individual enjoying unrestricted liberty. 503 U.S. at 123, 127. Second, and equally important, is the fact that the *Collins* decision involved a claim based upon an alleged creation of danger by state action (or inaction). *Id.* at 126. Thus, a claim for a deprivation of the substantive component of the Due Process Clause by a person enjoying unrestricted liberty based upon a creation of danger theory should be

governed, if at all, by whether the state action was "arbitrary" or "shocks the conscience." Because a police pursuit involves both a person ostensibly enjoying unrestricted liberty who contends that a government actor created the danger, petitioners respectfully submit that the Ninth Circuit committed error in failing to apply the "arbitrary" or "shocks the conscience" standard to the substantive due process claims in this case.

In analyzing the minimum standard of conduct to sustain a § 1983 claim in the context of a high-speed police pursuit, the Ninth Circuit relied primarily upon its decision in *Wood v. Ostrander*, 851 F.2d 1212 (9th Cir. 1988), *reh'g granted* and opinion modified by, 879 F.2d 583 (9th Cir. 1989)(*Wood* II), *cert. denied*, 498 U.S. 938 (1990). In *Wood* II, the Ninth Circuit determined that the appropriate legal standard to be applied in cases involving claims for violation of due process is whether a peace officer acted with "deliberate indifference." App. 17. Ultimately, the Ninth Circuit held that there was a question of fact whether the peace officer had been deliberately indifferent to plaintiff's interest in her personal security when he left her alone, stranded at night in a high crime area where she was subsequently attacked. In its opinion in this case, the Ninth Circuit did not attempt to reconcile the decision in *Wood* II with this court's decision in *Collins*. While the Ninth Circuit opinion does cite *Collins*, it is merely for the proposition that the Due Process Clause should not supplant traditional tort law. App. 11.

In addition, the Ninth Circuit also mistakenly relied upon *City of Canton v. Harris*, 489 U.S. 378 (1989) to support its holding in this case that the minimum standard to support substantive due process violations in the

context of a police pursuit is "deliberate indifference" or "reckless disregard." App. 16-17, 20-21. The Ninth Circuit had also relied on *City of Canton* in reaching its decision in *Wood* II. In so doing, the Ninth Circuit apparently chose to disregard the teachings of this court in *Collins*. Specifically, the *City of Canton* case was limited to establishing the legal standard for the second prong of a two part analysis in determining whether a municipality could be held liable for a violation of substantive due process. There are two separate issues when a "§ 1983 claim is asserted against a municipality: (1) Whether plaintiff's harm was caused by a Constitutional violation and (2) If so, whether the City is responsible for that violation." *Collins v. City of Harker Heights, TX*, 503 U.S. 115, 120 (1992) quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 817 (1985). Each of those issues requires a separate analysis. See, e.g. *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). This court emphasized in *Collins* that the decision in *City of Canton* was limited to the later issue of whether the "constitutional deprivation was attributable to a municipal policy or custom" and was "not deciding the constitutional issue." *Collins*, 503 U.S. at 123. This court then analyzed whether the allegations in *Collins* were sufficient to support a constitutional violation based upon the "arbitrary" or "shocks the conscience" standard. *Id.*, at 126. Thus, the underlying rationale relied upon by the Ninth Circuit for finding that the standard of conduct should be "deliberate indifference" or "reckless disregard," based on its holding in *Wood* II interpreting *City of Canton*, does not survive *Collins*. Therefore, in light of *Collins*, this court should reverse the decision of the Ninth Circuit in this case and direct that the proper standard to

be applied is whether the conduct of Deputy Smith was "arbitrary" or "conscience shocking."

2. Various Circuits Have Properly Applied The "Shocks the Conscience" Standard In Police Cases.

The Courts of Appeal for the First, Third, Sixth and Tenth Circuits have specifically relied upon the decision of this court in *Collins*, for the proposition that the "arbitrary" or "shocks the conscience" standard applies to claims by non-custodial persons asserting claims for denial of substantive due process under the Fourteenth Amendment. See, *Boveri v. Town of Saugus*, 113 F.3d 4 (1st Cir. 1997);[4] *Evans v. Avery*, 100 F. 3d 1033, 1038 (1st Cir. 1996) *cert. denied, sub nom* by *Evans v. Avery*, 117 S.Ct. 1693 (1997), *reh'g denied*, 138 L.Ed.2d 1032, 1997 U.S. Lexis 4222 (1997); *Williams v. City and County of Denver*, 99 F.3d 1009, 1015 (10th Cir. 1996), *reh'g granted en banc* (March 3,

[4] In support of the Petition for Writ of Certiorari, petitioners relied upon *Evans v. Avery*, 100 F. 3d 1033 (1st Cir. 1996) *cert. denied sub nom* by *Evans v. Avery*, 117 S.Ct. 1693 (1997), *reh'g denied*, 138 L.Ed.2d 1032, 1997 U.S. Lexis 4222 (1997) (applying the "shocks the conscience" standard to determine a violation of substantive due process in a police pursuit) to demonstrate that there exists a direct conflict with the decision by the Ninth Circuit in this case that the "deliberate indifference" standard applies to a claim for denial of substantive due process in a police pursuit case. Following the filing of the petition, the First Circuit Court of Appeals rendered its decision in *Boveri v. Town of Saugus* which reaffirms the decision in *Evans* that "shocks the conscience" is the appropriate standard in a police pursuit case. 113 F.3d at 1038. *Boveri* is also in direct conflict with the Ninth Circuit's decision in this case.

1997);[5] *Uhlrig v. Harder*, 64 F.3d 567, 573-574 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 924 (1996); *Lewellen v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 34 F.3d 345 (6th Cir. 1994);[6] *Fagan v. City of Vineland*, 22 F.3d 1296, 1304 (3d Cir. 1994), *en banc*. Significantly, the *Boveri*, *Evans* and *Fagan* cases all applied the "shocks the conscience" standard in the context of police pursuits. In reaching its conclusion, the First Circuit specifically criticized the Ninth Circuit opinion because it had ". . . paid insufficient attention . . . to *Collins*." *Evans*, 100 F.3d at 1038, n.4.

Prior to the decision in *Collins*, two Circuit Courts of Appeal had also adopted the shocks the conscience standard in police pursuit cases. *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 723 (4th Cir. 1991), *cert. denied*, 502

---

[5] The Tenth Circuit Court of Appeals has stayed the rehearing *en banc* pending the outcome of the Certiorari review in this case.

[6] The Ninth Circuit interpreted another Sixth Circuit decision as holding that the proper standard to be applied to substantive due process violations is "deliberate indifference." App. 14, n.4 citing *Foy v. City of Berea*, 58 F.3d 227, 230 (6th Cir. 1995). The significance of that interpretation is that two (2) pre-*Collins* cases from the Sixth Circuit that had applied a gross negligence standard now follows the "deliberate indifference" standard being adopted by the Ninth Circuit. See *Jones v. Sherill*, 827 F.2d 1102, 1106 (6th Cir. 1987); *Nishiyama v. Dickson, Tenn.*, 814 F.2d 277 (6th Cir. 1987), *en banc*. Petitioners submit that in *Lewellen*, the Sixth Circuit adopted the standard of "arbitrary" in a constitutional sense from *Collins*. *Lewellen*, 34 F.3d at 351; *Foy*, 58 F.3d at 231. Thus, the recent decisions from the Sixth Circuit do not support the Ninth Circuit's adoption of the "deliberate indifference" standard.

U.S. 1095;[7] *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986).

In *Evans*, the First Circuit held that in order to establish a violation of substantive due process in a police pursuit case, a plaintiff must show that the police officers acted with deliberate indifference to a victim's rights *and* that the officer's conduct shocks the conscience. *Evans v. Avery*, 100 F.3d at 1038, accord *Williams v. City and County of Denver*, 99 F.3d at 1015; *Uhlrig v. Harder*, 64 F. 3d at 573-574. The crucial distinction recognized by both the First and Tenth Circuits is that "deliberate indifference" and "shocks the conscience" are separate elements. *Id.* Although the Ninth Circuit appears to recognize that the holding in *Uhlrig* is accurate, it specifically rejected adding "shocks the conscience" to the test. See *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996); *Id.* at 901-902, J. Fernandez, concurring and dissenting (recognizing that "shocks the conscience" may be an element in every constitutional tort involving substantive due process and acknowledging that issue is not being decided in *Grubbs*). Consistent with its opinion in *Grubbs*, the Ninth Circuit opinion in this case also failed to consider the need for the additional element of "shocks the conscience." Based on the holdings in *Evans* and *Uhlrig*, however, the need to include the additional element of "shocks the conscience" element is now manifest.

---

[7] Although the *Temkin* case was decided before the *Collins* case, the Supreme Court denied the Petition for Writ of Certiorari in the *Temkin* case two days before it issued the opinion in *Collins*. *Evans v. Avery*, 897 F. Supp. 21, 22 (D. Mass. 1995).

Additionally, this court has implicitly approved the decisions by the Courts of Appeal in both *Evans* and *Temkin* by denying the Petitions for Writ of Certiorari in those cases. Significantly, this court declined Certiorari review of whether the Courts of Appeal in those cases had erred in holding that the appropriate standard for determining whether a substantive due process violation had occurred in a police pursuit is whether the officer's conduct "shocks the conscience," and that the correct standard should be whether the officers acted with reckless disregard or deliberate indifference. See, *Evans v. Avery*, 897 F. Supp. 21, 22 (D.Mass. 1995) (question No. 1 presented for certiorari review in *Temkin*); Petition for Writ of Certiorari in *Evans v. Avery*, U.S. S.Ct. No. 96-1390 (question presented for review No. 1).

Based on the foregoing, it is quite clear that other than the decision by the Ninth Circuit in this case, the Courts of Appeal that have had an opportunity to review substantive due process rights in the context of police pursuits have uniformly applied *Collins* properly. Adoption of the "shocks the conscience" test and reversal of the decision in this case is necessary for uniform application of that legal standard.

3. The More Restrictive Standard of "Shocks the Conscience" Provides An Appropriate Balance with The Governmental Interest in Promoting Effective Law Enforcement.

In determining the standard of conduct which will trigger protection under the Due Process Clause, it is necessary to analyze the nature of the interests at stake.

See, e.g. *Whitley v. Albers*, 475 U.S. at 320-321 (comparing standards of conduct necessary to trigger protection under the Eighth Amendment from deliberate indifference to medical needs to maliciously and sadistically applying force the very purpose of causing harm in the context of forceful prison security measures.) With respect to forceful prison security measures, this court found that a deliberate indifference standard did not adequately take into consideration the competing governmental interests or the reluctance to review "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Id.* For that reason, this court adopted a more restrictive standard to govern claims arising out of forceful prison security measures under the Eighth Amendment.

The test adopted to analyze conduct involving forceful security measures under the Eighth Amendment was "whether [the] force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-321 citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.) (Friendly, J.), *cert. denied, sub nom, John v. Johnson*, 414 U.S. 1033 (1973). This court went on to equate that test with the "shocks the conscience" test that applies to claims for an alleged denial of substantive due process. *Id.* at 327. Thus, in balancing significant governmental interests and the need for split second decisions in the field, against the protections afforded under the Due Process Clause of the Fourteenth Amendment, it is necessary to apply the more restrictive "arbitrary" or "shocks the conscience" standard so as to avoid unnecessary interference with those governmental activities. *Id.*

There is no question that governments through local state law enforcement agencies have a significant interest in promoting effective law enforcement. Likewise, this court has recognized and appreciated the difficulties faced by officers in the field with rapid evolving circumstances and the need to make split-second decisions. *Graham v. Conner*, 490 U.S. 386 (1989).

The First Circuit opinion in *Evans* was critical of the decision reached by the Ninth Circuit in this case since the panel had not paid sufficient attention to the legitimate demands of law enforcement when it concluded that deliberate indifference is always sufficient to support a § 1983 substantive due process claim. *Evans*, 100 F. 3d at 1038, n.4. The First Circuit analyzed the legitimate demands of law enforcement as follows:

> "Police chases are not only a necessary concomitant of maintaining order in our modern society, but they are also inherently hazardous. By their very nature, they inevitably create some risk of injury to bystanders. Officers must decide the balance between law enforcement and risk to public safety quickly and while under considerable pressure. In such circumstances, permitting the Due Process Clause to serve as a surrogate for state tort law would hamstring the police in their performance of vital duties." *Id.* at 1038; See also *Parton v. City of Bentonville*, 901 F. Supp. 1440 (W.D. Ark. 1995).

The Sixth Circuit has also recognized the government's interest in engaging in police pursuits to apprehend traffic offenders. *Galas v. McKee*, 801 F.2d 200, 203-204 (6th Cir. 1986). Although the issue in *Galas* was

whether high-speed pursuits by police officers are a reasonable method of seizing traffic offenders, the same governmental interests are at stake. In *Galas*, the Sixth Circuit noted that restricting the authority of police officers "to pursue traffic violators would not only severely hamper the effective enforcement of the traffic laws, it would also encourage offenders sought to be stopped for traffic offenses, but guilty of more serious crimes, to flee."

The foregoing examples demonstrate that in police pursuits, the governmental interests flow from both the institution and the individual officer. Law enforcement agencies must develop policies that balance the need to apprehend suspects with the potential risk of harm. There is also a serious concern that if unreasonable or impractical restrictions are placed on pursuits, it will encourage suspects to flee at higher speeds or to create more dangerous situations so that an officer is forced to break off the pursuit and allow the suspect to get away. Guidelines and their application are almost always pushed to the limit by suspects who dictate the speeds and locations of the pursuit. With every call for service and with every traffic stop, individual officers within a matter of seconds may be called upon to make life or death decisions not only affecting their lives, but that of a potential suspect, witness or bystander. Moreover, once a pursuit is under way, the fleeing suspect generally creates a much more dangerous situation, posing a much greater risk of injury or death to the suspect, innocent bystanders or the officer involved. As he flees and the risk of harm escalates, there is a greater need for apprehension. The officer must

assess those risks and balance them against the need to apprehend the suspect who is causing that danger.

In this case, Deputy Smith made a split-second decision to do one of the duties he has sworn an oath to uphold, namely, apprehend violators of the law. In making his decision, he did not know why the suspects fled or have the benefit of contemplating a long mixed history of case law concerning pursuits by law enforcement officers in relation to constitutional rights. Rather, he made a decision based on his seventeen years of experience as an officer in the field. As the pursuit progressed, the suspects posed a significant danger to other motorists resulting in a heightened sense of the need to apprehend them. Petitioners respectfully submit that it is precisely these types of discretionary decisions which are confronted by the law enforcement agencies and its officers on a day-to-day basis which the "deliberate indifference" standard does not adequately reflect. Therefore, based on the governmental interests at stake in a police pursuit, the "shocks the conscience" standard should be applied to this case.

4. Adoption of The "Deliberate Indifference" Standard Would Make the Fourteenth Amendment a Font of Tort Law.

The Due Process Clause of the Fourteenth Amendment should not be used to supplant traditional tort law. *Daniels v. Williams*, 474 U.S. 327, 332 (1986). If the decision by the Ninth Circuit in this case is allowed to stand, it will have created a new minimum threshold of conduct necessary to establish a claim for violation of substantive

due process. A minimum standard of either "deliberate indifference" or "reckless disregard" is contrary to this court's long standing policy. Such a result would also contravene the policy against expansive interpretation of the Due Process Clause.

The practical effect of the Ninth Circuit's standard of "deliberate indifference" and "reckless disregard" is that it will create a new federal tort. Artful pleading will give rise to a triable issue of fact as to "deliberate indifference" or "reckless disregard" under a multitude of circumstances. This is particularly true in the context of a police pursuit where high speeds almost always create dangerous situations in which there is always an inherent risk of harm. See *Parton v. City of Bentonville*, 901 F. Supp. at 1444. Cases involving factual scenarios which would not have crossed the constitutional line since the conduct was not "arbitrary" or "conscience shocking" in a constitutional sense, will nevertheless proceed as a body of federal tort law. This is already evident from three recent cases relying upon the opinion by the Ninth Circuit in this case. See, *Smoot v. City of Placentia*, 950 F. Supp. 282 (C.D. Ca. 1997) (based on *Lewis*, the standard of proof to a claim for a violation of substantive due process in the shooting death of an adult child is "deliberate indifference" or "reckless disregard."); *Onassian v. Block*, 95-55837, 1996 U.S. App. Lexis 32781 (9th Cir. Nov. 5, 1996) (based on *Lewis*, allegations that motorists pursued motorists up to 100 miles per hour on busy surface streets, it cannot be said that plaintiff could prove no set of facts entitling them to recover); *Torres v. Bonnilla*, 95-55875, 1996 U.S. App. Lexis 32765 (9th Cir. Nov. 5, 1996) (based on *Lewis*, allegations that pursuit took place

on freeway up to 130 miles per hour with officers following within 100 yards, it cannot be said that plaintiff can prove no set of facts entitling him to relief).

Therefore, reversal of the Ninth Circuit opinion in this case is also necessary to limit expansion of the Due Process Clause and to prevent the creation of a new federal tort.

5. No Constitutional Violation Occurred in This Case.

Petitioners respectfully submit that once this court has determined that conduct which "shocks the conscience" is necessary to establish a claim for denial of substantive due process in a police pursuit case, then this court should also find that no constitutional violation occurred under the facts and circumstances of this case. The record is sufficiently well developed in this case to demonstrate that the conduct of Deputy Smith in initiating and conducting the pursuit as set forth in the Statement of Facts was not "arbitrary" or "conscience shocking" in a constitutional sense. Deputy Smith had well stated reasons for initiating and conducting the pursuit. As the pursuit progressed, Deputy Smith developed a heightened sense of the need to apprehend the suspects due to their endangering the public. Deputy Smith maintained a distance of approximately 300 between himself and the suspects when the motorcycle suddenly and without prior warning locked up its rear wheel while negotiating a 90°, turn to make good the escape. Deputy Smith immediately applied the brakes but the patrol unit accidentally skidded into the motorcycle and struck and killed Lewis. The record is devoid of any evidence that

Deputy Smith was abusing his police powers, that he had intentionally misused his police vehicle or that he had acted maliciously or sadistically for the very purpose of causing harm. At best, Deputy Smith's conduct might be construed as negligent, but certainly did not cross the constitutional line. Thus, petitioners respectfully submit that this court find that the police pursuit engaged in by Deputy Smith did not constitute a violation of substantive due process rights.

For all of the reasons set forth above, petitioners respectfully request that this court reverse the decision of the Ninth Circuit Court of Appeals in this case and confirm the application of the "shocks the conscience" standard to a claim for denial of substantive due process in the context of a police pursuit and further find that no constitutional violation occurred in this case.[8]

II

DEPUTY SMITH IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW CONCERNING SUBSTANTIVE DUE PROCESS IN THE CONTEXT OF A POLICE PURSUIT WAS NOT CLEARLY ESTABLISHED AND A REASONABLE OFFICER COULD NOT HAVE KNOWN HE WAS VIOLATING THE LAW

The threshold question in determining whether a claim is barred by qualified immunity is whether the conduct of the government official violated law that was

---

[8] If the Court finds that the appropriate standard is "shocks the conscience" and that no constitutional violation occurred in this case, the issues involving qualified immunity as set forth in part II are rendered moot.

clearly established at the time of the incident. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The court must also determine whether a reasonable officer could have believed the conduct in question was lawful, in light of the clearly established law and the information possessed by the officer. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); see also, *Hunter v. Bryant*, 503 U.S. 224, 227-228 (1991).

Petitioners submit that the law concerning substantive due process in the context of a police pursuit was not clearly established in May, 1990, in that (1) cases in existence at that time reflected a conflict in the law as to the appropriate legal standard to be applied; (2) the law was not sufficiently factually defined that a similarly situated government official would know that his conduct was violating federal law; and (3) a reasonable officer in Deputy Smith's position and based on the information known to him could not have known that his conduct violated substantive due process rights.

1. The Law Concerning Substantive Due Process Violations in the Context of a Police Pursuit Was Not Clearly Established in May, 1990.

"The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably' [to] anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, 483 U.S. at 646, quoting *Davis v. Sherer*, 468 U.S. 183, 195 (1984). "Where that rule is applicable, officials can know that they will not be held personally liable as long as their

actions are reasonable in light of current American law." *Id.*

Whether the law was "clearly established" at the time the action was taken greatly depends "upon the level of generality at which the relevant legal rule is to be identified." *Anderson v. Creighton*, 483 U.S. at 639 (1987). "The right the official is alleged to have violated must have been 'clearly established' in a more particularized and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, 483 U.S. at 640.

Petitioners submit that "clearly established" means just that, a clear bright line standard not comprised of generalities or possibilities. The reason for this bright line standard is to prevent officials from always erring on the side of caution for fear of being sued. *Hunter v. Bryant*, 503 U.S. 224, 229 (1991) *per curium*. Moreover, it serves the purpose of protecting "officials who are required to exercise their discretion and the related public interest in encouraging vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732 (1982). Additionally, "[i]f the law at the time is not clearly established, an officer could not reasonably be expected to anticipate subsequent legal developments nor could he or she fairly be said to "know" that the law forbade conduct not previously identified as unlawful." *Id.*, 457 U.S. at 818, 102 S.Ct. at 2738. "If there is a legitimate question as to whether an official's conduct amounts to a constitutional violation, then the qualified immunity defense protects that official." *Singer v. State of Maine*, 49

F.3d 837, 845 (1st Cir. 1995) (quoting *Wylie v. Doory*, 14 F.3d 993 (4th Cir. 1994)).

Initially, if this court determines that the appropriate legal standard for determining whether there has been a denial of substantive due process in the context of a police pursuit is whether the conduct is "arbitrary" or "conscience shocking" in a constitutional sense, thereby reversing the decision by the Ninth Circuit that a different standard should apply, then certainly the law on this issue could not have been clearly established in May, 1990. It is equally evident that the law was not clearly established due to the conflicting legal standards on that issue that have been pronounced by the different Courts of Appeal. In that regard, there is a direct conflict between the Ninth Circuit's conclusion that the legal standard is "deliberate indifference" or "reckless disregard" and the decisions in other circuit courts that the legal standard to be applied is "shocks the conscience." In adhering to the principles set forth in *Collins*, the First Circuit Court of Appeals has held that the conduct necessary to establish a violation of substantive due process in a police pursuit is "shocks the conscience." *Evans v. Avery*, 100 F.3d at 1038; accord *Boveri v. Town of Saugus*, 113 F.3d 4; *Fagan v. City of Vineland*, 22 F.3d at 1296, 1306-07; *Temkin v. Frederick County Comm'rs*, 945 F.2d 716; *Checki v. Webb*, 785 F.2d 534, 538.[9] Thus, respondents

[9] See also District Court cases in accord, *Hicks v. Leake*, 821 F. Supp. 419 (W.D. Va. 1992) (Decided January, 1992, involving pursuit occurring in February, 1990); *Smith v. Lexington Fayette Irvine County Gov't*, 884 F. Supp. 1086 (E.D. Ky. 1995) (Decided May, 1995, pursuit occurring April, 1993); *Carrol v. Burrough of State College*, 854 F. Supp. 1184 (C.D. Pa. 1994) aff'd 47 F.3d 1160 (3d Cir. 1996) (Decided June, 1994, pursuit occurring July, 1990).

cannot establish that the law regarding substantive due process rights in a police pursuit was clearly established in May, 1990.

It is equally important to note that prior to May, 1990, other Courts of Appeal analyzing the substantive due process rights also adopted different legal standards. See *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989) (negligence or grossly negligent conduct does not state a claim under 42 U.S.C. § 1983 for substantive due process); *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (gross negligence sufficient to support a claim for substantive due process); *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986) (negligent or even grossly negligent conduct not sufficient to support alleged substantive due process violation.)[10] Once again, the different legal standards adopted by those circuit courts compel the conclusion that the law regarding the minimum conduct necessary to establish a violation of substantive due process was not clearly established at the time of the police pursuit in this case.

The foregoing demonstrates that both before and after the pursuit in this case the evolving legal standards of conduct to establish substantive due process rights in police pursuit cases were not clearly established in May, 1990. The vagaries in the various legal standards were

[10] There is also a line of authorities which determined that there can be no claim for denial of substantive due process arising out of a police pursuit. *Campbell v. White*, 916 F.2d 421 (7th Cir. 1990); *Estate of Story through McNair v. McDuffie County*, 929 F. Supp. 1523 (S.D. Ga. 1996); *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mi. 1990).

further compounded by the numerous and varied definitions attached to those standards by the Courts of Appeal. In fact, many of the cases cited above go to painstaking efforts to attempt to define the current state of the applicable standard to establish a violation of substantive due process as it continues to vary from circuit to circuit at the time each respective decision was issued. For those reasons, petitioners respectfully submit that respondents cannot satisfy the requirement that the law was clearly established at the time of the pursuit in this case and therefore Deputy Smith is entitled to qualified immunity.

2. Qualified Immunity is Appropriate Where the Law is Not Sufficiently Factually Defined.

Petitioners also respectfully submit that the Ninth Circuit Court of Appeals erred in denying Deputy Smith qualified immunity based on its determination that he should have been on notice that he could possibly be held liable for his conduct. In order for the law to be clearly established to overcome qualified immunity, the pre-existing law must be sufficiently factually defined such that a similarly situated reasonable government official in the position of the defendant would know that what they are doing under those circumstances violates federal law. *Lassiter v. Alabama A.N.M. Univ., Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994). "Because qualified immunity is a doctrine of practical application to real-life situations, courts judge the acts of defendant government officials against the law and facts at the time defendants acted, not by hindsight, based on later events. *Id.*, citing *Hunter v. Bryant*, 502 U.S. at 228. Thus, in determining whether

the law applicable to certain facts is clearly established, it is necessary to consider the facts of the cases relied upon as precedent. *Lassiter, supra*, at 1150. Although the facts need not be exactly the same, they must be materially similar. *Id.* "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects a defendant." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994).

In support of the finding that Deputy Smith should have been on notice that he could possibly be held liable for his conduct, the Ninth Circuit relies upon *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Brower v. County of Inyo*, 489 U.S. 593 (1989). In those cases, however, this court analyzed police conduct under the Fourth Amendment. Moreover, both of these cases involved the intentional application of force to stop a fleeing suspect. The *Brower* case involved a forcible vehicle stop by utilizing a roadblock. Because the instant case did not involve a forcible stop, see footnote 3, *supra*, the *Brower* case does not support a finding that the law was clearly established with respect of substantive due process rights arising out of a police pursuit.

The Ninth Circuit also attempts to analogize to this court's prior decision regarding the intentional use of deadly force in *Tennessee v. Garner* to determine whether the law was clearly established in this case. Relying on a District Court decision rendered after the pursuit in this case, the Ninth Circuit points out that a car can be used as a deadly weapon. App. 30-31, citing *Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991); but see, *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 195 (E.D.

Ark. 1989) (holding post-*Brower* that a pursuit is not deadly force). By combining the holdings in *Garner*, *Brower* and *Frye*, the Ninth Circuit found that Deputy Smith was on notice that he could be held liable for the use of deadly force to stop a suspect in the context of a high-speed pursuit. While that may be true if Deputy Smith had attempted to effect a forcible stop of the motorcycle, in this case that analysis does not apply to the accidental death of a fleeing suspect in a police pursuit. Thus, *Garner* does not shed any light with respect to whether the law was clearly established concerning substantive due process rights arising out of a police pursuit.

To establish that Deputy Smith was on "notice" that he could possibly be held liable for his conduct, the Ninth Circuit also relied upon *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989); *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987); and *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986) App. 32. The Ninth Circuit found that those cases sent a clear message that conduct which is sufficiently egregious may lead to liability under § 1983. App. 35. While these cases reflect some of the case law which existed prior to the time of the pursuit in this case in May, 1990, the facts of those cases do not stake out a bright line such that a reasonable officer in the position of Deputy Smith would know that his conduct violates federal law.

In *Roach v. City of Fredericktown*, the Eighth Circuit found that since the conduct of the officer in a police pursuit did not rise to the level of gross negligence, it certainly did not rise to conduct which would sustain a claim for a denial of due process under § 1983. In *Roach*, an officer observed a car exiting an alley in an area with recent burglaries. Upon running a cross-check of the

license plates, the officer learned that it was not registered to the vehicle he observed. The officer activated his red flasher lights and the suspect vehicle accelerated away resulting in a pursuit outside of the city limits. The suspect ultimately lost control of his vehicle and collided with an oncoming car containing the plaintiffs. Plaintiffs alleged that the officer was in high speed pursuit of an individual who had committed only a traffic offense, that the officer had violated City policy by pursuing a vehicle outside the City limits and beyond his jurisdictional limits and the officer had violated state law by pursuing a vehicle without activating his siren. The District Court found and the Court of Appeal agreed that those allegations stated, at best, a claim for negligence and did not constitute gross negligence or reckless conduct. Thus, when analyzing the facts of *Roach* in the context of clearly established law, the pursuit of a minor traffic offender where an officer violated city policy and state law for going beyond jurisdictional limits and failing to utilize an emergency siren is within an acceptable realm of conduct that does not cross the constitutional line.

In *Jones v. Sherrill*, the Sixth Circuit analyzed the facts of that case under a standard of "gross negligence" to determine whether there was potentially a denial of substantive due process. *Jones*, 827 F.2d at 1106. The Sixth Circuit specifically noted, however, that the conduct necessary to support that standard must be outrageous or an arbitrary use of government power. *Id.* In *Jones*, two police officers engaged in a police pursuit for approximately nine (9) miles in attempting to apprehend a furloughed prisoner. Plaintiff alleged that the vehicles were driven at speeds of 120 - 135 miles per hour in traffic

within city limits, and that the police vehicles were following the suspect's vehicle too close for safety. The pursuit ended when the suspect vehicle crossed the center line of the highway and collided with the vehicle operated by the plaintiff's decedent. *Id.* at 1103, 1106. The Sixth Circuit Court of Appeals found that conduct might support a claim for negligence under state law, but did not involve "reckless indifference" in that the police officers were not "engaged in a reckless and dangerous joyride for no good reason." *Id.* at 1107. Since the officers observed a car being driven in a dangerous manner, had reason to believe it had been involved in an accident, the driver did not stop as requested and the officers pursued the vehicle at a speed necessary to apprehend it, the pursuit did not involve outrageous conduct or the arbitrary use of government power. *Id.* Thus, in defining the parameters of clearly established law, assertions that the police pursuit of a traffic offender involving speeds up to 120 - 135 miles per hour, with the patrol unit traveling too closely to the suspect vehicle through populated areas is also within the acceptable realm of conduct that does not violate the Fourteenth Amendment.

In *Checki v. Webb*, the Fifth Circuit Court of Appeals determined that the facts as alleged in that case stated an actionable claim under § 1983 based upon "malicious abuse of official power shocking to the conscience." *Checki*, 785 F.2d 538. The *Checki* case is the only case relied upon by the Ninth Circuit Court of Appeals which provides any guidance as to a factual basis for determining when a police officer's conduct in a police pursuit may have crossed the constitutional line to support a claim for denial of substantive due process. *Id.* In *Checki*, an

unmarked state police vehicle occupied by two state troopers wearing cowboy hats approached and tailgated Checki's car. Not recognizing it was the police and concerned about the tailgating, Checki attempted to accelerate away at speeds in excess of 100 miles per hour but the unmarked state police vehicle continued to pursue him "at times tailgating to within two to three feet of the Checki vehicle." *Id.* at 535. After pursuing Checki for approximately 20 miles, the unmarked police vehicle finally activated its red grill lights and siren. Checki, not believing the pursuers were police, exited the Interstate where he was stopped at a roadblock erected by State Police which was approximately 30-31 miles from the point at which Checki had first observed the unmarked police vehicle. *Id.* at 536. Checki also alleged that upon exiting the vehicle, one of the officers handcuffed and struck him in the face with a revolver causing severe facial injuries while the other officer broke his companions arm. *Id.* Based on those facts, the Fifth Circuit found "where a police officer uses a police vehicle to terrorize a civilian, and he has done so with malicious abuse of official power shocking to the conscience, a court may conclude that the officers have crossed the 'constitutional line'." *Id.* at 538. In *Checki*, there was no apparent reason why the police officers sought to stop the vehicle. Thus, in factual terms, the constitutional line may be crossed when an officer maliciously abuses his official power by using an unmarked state police vehicle to tailgate to within 2 - 3 feet of a citizen's vehicle at speeds in excess of 100 miles per hour for approximately 20 miles.

There are also two District Court cases which were decided prior to May, 1990, that analyze substantive due

process rights in the context of police pursuits. In *Easterling v. City of Glennville*, 694 F. Supp. 911 (S.D. Ga. 1986), the District Court found the factual allegations were sufficient to support a claim for a violation of substantive due process. After a lengthy pursuit, the suspect's vehicle failed to negotiate a sharp turn and ran off the road striking a tree causing the death of the seventeen year old suspect. Plaintiffs presented evidence that the defendant officers knew the identity of the suspect and failed to break off the pursuit and arrest him at a later time, that the primary pursuit officer had previously threatened the suspect with a toy gun and had been overheard threatening the youth in the days preceding the pursuit. Based on that evidence, the District Court found that the officers' intentional harassment of the suspect may have played a role in his flight from the officers and therefore a question of fact existed as to whether that conduct was arbitrary or an abuse of power. *Id.* at 922.

In *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189 (E.D. Ark. 1989) the District Court found that the police pursuit of a suspected car thief whose vehicle apparently collided with the car operated by plaintiff's decedent did not constitute "gross negligence." The officer had observed the stolen car and as he called for back-up, the driver of the stolen car saw the patrol unit and sped away. The officer pursued the suspect vehicle for approximately one minute and was on the verge of breaking off the pursuit when he observed a cloud of dust. The suspect vehicle had collided with the vehicle driven by plaintiff. Again, an officer engaged in a routine pursuit lasting approximately one minute was not found to be grossly negligent or reckless.

In this case, Deputy Smith had reason to pursue the suspects since they had failed to yield to a request by another officer to pull over and had accelerated away at a high rate of speed. Deputy Smith immediately activated the emergency lights and siren of his patrol unit which were utilized during the pursuit, but the motorcycle did not stop as requested. Upon observing the motorcycle using both the north bound and south bound lanes, forcing at least two south bound vehicles to swerve off the roadway onto the shoulder, his interest in apprehending the reckless driver increased due to public endangerment. Deputy Smith did not obtain the license plate number and could not have apprehended them at a later time. It was only after the suspects lost control of the motorcycle by attempting to negotiate one last 90° turn to make good their escape that Deputy Smith, suddenly and without prior warning, was required to slam on his brakes at a distance approximately 300 feet behind the motorcycle. The pursuit only lasted approximately 75 seconds and covered a distance of only 1.3 miles. During that brief time, Deputy Smith was unable to establish radio contact with his dispatcher since his radio was tuned to the wrong frequency.

The record in this case does not disclose any evidence that Deputy Smith engaged in any conduct which would support a finding that his conduct was "arbitrary" or "conscience shocking" in a constitutional sense. Specifically, there is no evidence that he acted maliciously or sadistically for the very purpose of causing harm or that he maliciously abused his police powers. Furthermore, if it can be said that a bright line for determining when a violation of substantive due process had emerged in the

context of the case law which existed prior to May, 1990, by comparing *Checki* and *Easterling* with *Roach, Jones* and *Britt*, then the conduct of Deputy Smith clearly falls within *Roach, Jones* and *Britt*. At the same time, the pursuit in this case does not involve any of the culpable facts displayed in *Checki* and *Easterling*. While the conduct of Deputy Smith may arguably be characterized as imprudent or negligent based on speeds, distances and visibility, this accident certainly did not cross the constitutional line factually defined by the case law existing in May, 1990. Thus, petitioners respectfully submit that the law was not sufficiently clearly established that a reasonable officer in the position of Deputy Smith would have known that he was violating federal law by engaging in the police pursuit under the facts of this case. Petitioners also respectfully submit that the decisions in cases involving police pursuits that have been decided since May, 1990, are also instructive regarding the factual scenarios which support a finding of qualified immunity in favor of Deputy Smith.[11] In *Temkin v. Frederick County*

---

[11] There are also several District Court cases in this category. See *Corbin v. City of Springfield*, 942 F. Supp. 721 (D.Mass. 1996) (officer pursued suspect in residential and commercial areas on two lane streets with suspect's speed at 70 m.p.h. or greater with patrol unit 150 - 200 feet behind using only blue lights and not siren at speeds in excess of 60 m.p.h. when suspect ran red light and broadsided plaintiff's vehicle violating departmental policies which plaintiff's expert concluded was reckless. The Court granted qualified immunity since the law regarding an alleged violation of substantive due process was not clearly established as of December 27, 1991); *Smith v. Lexington Fayette Urban County Gov't*, 884 F. Supp. 1086 (E.D. Ky. 1995) (high speed pursuit of a suspected DUI at close distances, in city limits with vehicular and pedestrian traffic,

Commr's, 945 F.2d 716 (4th Cir. 1991), a case which involved facts strikingly similar to this case, the Fourth Circuit found that the conduct of the officer in that police pursuit did not "shock the conscience." In *Temkin*, the plaintiffs relied on the following facts to support their claim:

> "1) The chase continued for a significant period of time over a ten mile area; 2) The chase continued at a very high rate of speed; 3) The chase was initiated because of a minor violation; 4) The police already had, at a minimum, a partial identification of the license plate of the suspect vehicle; and, 5) The chase violated General Order No. 204 because Shelby failed to maintain radio contact with his supervisor throughout. To those five facts we would add the expert deposition testimony of Dr. Jeffrey Alpert that Shelby's conduct was 'reckless' 'totally irresponsible' and 'wanton.' " *Id.* at 723.

---

disregarding traffic signals and failing to use emergency equipment in violation of department regulations and policy. Law did not meet the stringent "shocks the conscience" standard for a violation of substantive due process rights; no need to consider issue of qualified immunity.); *Hicks v. Leake*, 821 F. Supp. 419 (W.D. Va. 1992) (officer observes car speeding and begins pacing car at a high rate of speed without activating lights or siren, violating official standards of conduct, the officer had called ahead for assistance to complete the stop. Actions suggestive of a negligence claim but does not meet the "shock the conscience" standard); *Fulkerson v. City of Lancaster*, 801 F. Supp. 1476 (E.D. Pa. 1992) (high speed pursuit of a motorcycle at speeds between 35 to 40 m.p.h. to 70 - 80 m.p.h. when officer lost control driving on an unfamiliar road at too high a speed crossing the center line and striking plaintiff's on-coming vehicle. Potentially negligent but not sufficient to establish gross negligence).

The speeds of the vehicles involved in *Temkin* reached 65 to 105 m.p.h. *Id.* at 718. The accident had occurred when the suspect's vehicle failed to negotiate a curve in the road, lost control, crossed over the yellow line, and struck a vehicle operated by an innocent civilian. Upon observing the suspect vehicle start to lose control, the officer "stood on the brakes, but skidded out of control and struck the vehicle operated by the civilian with a speed on impact of 60 m.p.h. *Id.* at 718.

When compared to the facts in this case, it is quite evident that Deputy Smith's conduct in both initiating and in the manner of conducting the pursuit was clearly less egregious. Thus, the conduct of Deputy Smith certainly does not "shock the conscience."

In *Fagan v. City of Vineland*, 22 F.3d at 1299-1300, officers attempted to pursue a vehicle for a minor traffic violation which involved running numerous stop signs and stop lights through a residential neighborhood at speeds up to 70 to 80 miles per hour. The suspect vehicle ultimately entered an intersection striking a civilian vehicle. An expert witness also opined that the pursuit was conducted in a reckless manner. *Id.* at 1302. In analogizing the facts to the *Temkin* case, the Third Circuit concluded that the conduct of the police pursuit in *Fagan* did not "shock the conscience."

In recent decisions by the First Circuit, cases involving police pursuits did not involve conduct that "shocks the conscience." *Boveri*, 113 F.3d 4; *Evans*, 100 F.3d 1033. In *Boveri*, officers responded to a call of a disturbance and engaged in a high-speed pursuit in extremely inclement weather. The vehicles traveled at speeds in excess of 80

m.p.h. for over three miles with the patrol unit only a few car lengths behind the suspect vehicle. The suspect vehicle exited onto another roadway, was unable to stop and hydroplaned into plaintiff's car. Despite allegations that the officer's conduct violated departmental rules, state law and an order from the dispatcher to cease and desist the pursuit, the First Circuit, while concerned that the manner in which the pursuit was conducted was troubling, held that it did not cross the "shocks the conscience" line. *Boveri*, 113 F.3d at 7. In *Evans*, 100 F.3d at 1035, the officers pursued a suspected drug trafficker into a densely populated area with heavy traffic knowing that pedestrians would be present. The suspect vehicle headed into an intersection with limited visibility, lost control and struck an innocent bystander. *Id.* The First Circuit concluded that the factual scenarios in other cases were more egregious and therefore the conduct of the officers in conducting the pursuit in *Evans* did not "shock the conscience." *Id.* at 1038.

The Seventh Circuit Court of Appeals also recently granted qualified immunity to an officer involved in a police pursuit in February, 1993, in relation to a claim for violation of substantive due process. *Magdziak v. Bird*, 96 F.3d 1045 (7th Cir. 1996). In *Magdziak*, the pursuit involved speeds of up to 120 miles per hour over a distance of approximately 3 miles during which the officer failed to operate his oscillating lights or siren and did not make radio contact in violation of Illinois State law and State Police directives. The Seventh Circuit found the officer was entitled to qualified immunity since there was no violation of a clearly established constitutional right by engaging in a high-speed pursuit without lights, siren

or maintaining radio contact pursuant to police regulation.

In light of the factual contours of the pre-existing law, and taking into consideration the case law that has evolved since the time of the pursuit in this case in May, 1990, a reasonable officer in the position of Deputy Smith would not have known he was violating federal law under the circumstances of this case. While there are factual similarities between the pursuit in this case and the conduct of the officers in *Jones, Roach* and *Cannon*, Deputy Smith's conduct is certainly less egregious than that of the deputy in *Temkin* which held that type of conduct in a police pursuit did not meet the "shocks the conscience" test. Thus, under the facts and circumstances of this case, as evaluated in light of the facts defined in pre-existing case law and as tempered against subsequent case law, petitioners respectfully submit that Deputy Smith is entitled to qualified immunity since the law regarding a violation of substantive due process was not clearly established at the time he engaged in this police pursuit in May, 1990.

3. A Reasonable Officer Could Not Have Known That This Pursuit Would Violate Clearly Established Law.

"If the law at the time [the incident occurred] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 102 S.Ct. at 818.

In May, 1990, a reasonable officer in the position of Deputy Smith could not have known that the initiating and continuing to engage in the pursuit in this case would have violated federal law. This court had not addressed the standard of conduct which would be necessary to support a claim for denial of substantive due process in the context of a police pursuit. The Courts of Appeal which had addressed the issue had all adopted varying standards of conduct, including some decisions which had rejected the assertion of such a claim. Moreover, the limited case law reviewing police pursuits were not sufficiently factually defined to create a bright line as to when a violation of substantive due process would occur. Furthermore, factual scenarios that had been defined would have led a reasonable officer to believe that so long as he was properly engaged in a pursuit of a fleeing suspect, he would not be violating federal law, even if the officer makes some mistakes along the way. While a reasonable officer should most likely have recognized that he should not abuse his police powers by intentionally terrorizing, harassing or threatening a citizen, the routine carrying out of his police duties, even if highly dangerous, that result in an accident were not and should not be a violation of federal law. Therefore, petitioners respectfully submit that Deputy Smith is entitled to qualified immunity since a reasonable officer in his position would not have known he was violating federal law in connection with the police pursuit resulting in the accident in this case.

III

CONCLUSION

For all of the foregoing reasons, petitioners COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and DEPUTY SMITH respectfully request that the Court reverse the judgment of the Court of Appeals.

Dated: August 8, 1997

Respectfully submitted,

TERENCE J. CASSIDY*
MARCOS A. KROPF
PORTER, SCOTT,
WEIBERG & DELEHANT
A Professional Corporation
350 University Avenue, Suite 200
Sacramento, CA 95825
(916) 929-1481

*Counsel of Record

Attorneys for Petitioners

(16)

Supreme Court, U.S.
FILED
OCT 3 1997
CLERK

No. 96-1337

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

PAUL J. HEDLUND
MICHAEL L. BAUM
Counsel of Record
BAUM, HEDLUND, ARISTEI, GUILFORD & DOWNEY
Attorneys for Respondents
12100 Wilshire Boulevard, #950
Los Angeles, California 90025
(310) 207-3233

71033
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, Inc.

52 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Table of Citations	iii
Statement of Facts	1
Summary of Argument	4
Argument	5
I. In Light Of Precedent And The Fundamental Rationale For Constitutional Protection Against Arbitrary Government Deprivations, The Due Process Clause Is Violated By Government Officials' Reckless Conduct That Deprives A Person Of Life Or Liberty.	5
A. Conduct That is Deliberately Indifferent to or Shows a Reckless Disregard for Expressly Protected Constitutional Life and Liberty Interests Is an Arbitrary Abuse of Power Cognizable as a Violation of the Due Process Clause.	9
B. Recognizing Reckless or Indifferent Conduct as a "Deprivation" Would Not Implicate the Same Concerns Surrounding Negligent, Unintentional Acts.	16
C. Petitioners Themselves Conceded That Reckless Conduct Was Sufficient to Establish a Fourteenth Amendment Violation and Should Not Be Estopped to Contend Otherwise.	18

Contents

Page

D. A "Shocks the Conscience" Standard in Police Pursuit Cases Is Ambiguous and Unworkable, Would Not Provide Sufficient Deterrence, and Would Conflict with this Court's Due Process Cases Which Establish Intent as the Ceiling of Culpability. 21

II. Qualified Immunity Is Not Available To Petitioner Smith Since The Law Was Sufficiently Clearly Established At The Time Of The Incident And Petitioner Smith Could Not Have Believed That His Conduct Was Lawful. 26

A. The Law at the Time of the Incident Was Clearly Established and Provided Petitioner Smith with Adequate Notice That His Conduct During the Course of a Police Chase Violated the Constitutional Rights of the Respondent's Decedent. 26

B. Neither Officer Smith, Nor Any Reasonable Officer with the Sacramento County Sheriff's Department, or Anywhere Else, Could Reasonably Believe That the Conduct Exhibited by Petitioner Smith in this Case Was Lawful. 38

C. Petitioners Themselves Have Conceded That the Law Was Clearly Established at the Time of the Incident. 41

Conclusion 42

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 ..... 37, 38, 41

Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) 13

Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990) 13, 15, 31

Bass v. Jackson, 790 F.2d 260 (2d Cir. 1986) 31

Board of County Comm'rs of Bryan County, Oklahoma v. Brown, 117 S. Ct. 1382 (1997) 13

Boddie v. City of Columbus, Mississippi, 989 F.2d 745 38

Britt v. Little Rock Police Dep't., 723 F. Supp. 189 (E.D. Ark. 1989) 13, 19, 31, 35, 36, 37, 38, 41

Brower v. County of Inyo, 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) 28, 29, 31, 37, 38

Checki v. Webb, 785 F.2d 534 (5th Cir. 1986) 31, 37, 38

City of Canton, 489 U.S. 378, 109 S. Ct. 1197 .. 35, 37, 38, 41

Contents

	Page
Colburn v. Upper Darby Township, 838 F.2d 663 (3d Cir. 1988)	21
Collins v. Harker Heights, 503 U.S. 115 (1992)	4, 5, 8, 18, 21, 22, 24, 25
Columbia v. Okley, 17 U.S. 235 (1819)	6
Daniels v. Williams, 474 U.S. 327 (1986)	4, 5, 6, 9, 10, 11, 16, 17, 22, 25, 30, 31, 37, 38, 41
Dartmouth College v. Woodward, 17 U.S. 518 (1819)	6
Davidson v. Cannon, 474 U.S. 344 (1986)	9, 11, 16, 31
Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984), *aff'd*, 474 U.S. 344, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)	31
Easterling v. City of Glennville, 694 F. Supp. 911 (S.D. Ga. 1986)	35, 36, 37, 38
Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996), *cert. denied*, 65 U.S.L.W. 3611 (May 12, 1997)	21, 22
Fagan v. City of Vineland, 77 F.3d 1306	13, 15, 21, 22, 24, 25, 26
Fargo v. City of San Juan Bautista, 857 F.2d 638 (9th Cir. 1988)	35

Contents

	Page
Foucha v. Louisiana, 504 U.S. 71 (1992)	5, 8
Frye v. Town of Akron, 759 F. Supp. 1320 (N.D. Ind. 1991)	28, 29
Germany v. Vance, 868 F.2d 9 (1st Cir. 1989)	31
Goldberg v. Kelly, 397 U.S. 254 (1970)	6
Graham v. Conner, 490 U.S. 386 (1989)	29, 30, 31, 37, 38
Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)	6
Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727	36, 37, 38
Harris v. Maynard, 843 F.2d 414 (10th Cir. 1988)	31
Hill v. Shobe, 93 F.3d at 421	13, 22
Hurtado v. California, 110 U.S. 516 (1884)	6
Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987)	31, 37, 38
Leffall v. Dallas Indp. Sch. Dist., 28 F.2d 531	13
Lewis v. Sacramento, 98 F.3d 434 (9th Cir. 1996)	1, 17, 22, 28, 37
Maihews v. Eldridge, 424 U.S. 319 (1976)	6

Contents

	Page
Malley v. Biggs, 475 U.S. 336, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)	37
Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992)	12
Monell v. New York City Dept. Of Social Services, 436 U.S. 658 (1978)	3
Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled on other grounds, Monell v. Dept. of Social Services*, 436 U.S. 658 (1978)	17, 18
Moore v. East Cleveland, 431 U.S. 494 (1977)	7
Morales v. New York State Dept. of Corrections, 842 F.2d 27 (2nd Cir. 1988)	21
Nishivama v. Dickson County. Tenn., 814 F.2d 277 (6th Cir. 1987)	31
Pacific Mutual Life Ins., Co. v. Halsip. 499 U.S. 1 (1991)	7
Paul v. Davis, 424 U.S. 693 (1976)	16
Pleasant v. Zamieski, 895 F.2d 272 (6th Cir.1990)	30
Poe v. Ullman, 367 U.S. 497 (1961)	7
Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985)	7

Contents

	Page
Roach v. City of Fredericktown, 882 F.2d 294 (8th Cir. 1989)	22, 31, 37, 38
Rochin v. California, 342 U.S. 165 (1952)	22, 23, 24
Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065, 109 S. Ct. 1337, 103 L. Ed. 2d 808 (1989)	22
Tempkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992)	21
Tennessee v. Garner, 471 U.S. 1 (1985), *cert. denied*, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990).	27, 29, 30, 31, 37, 38
TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993)	7
Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995)	21, 22
United States v. Lanier, 117 S. Ct. 1219 (1997)	26, 28, 41
White v. Rochford, 592 F.2d 381 (7th Cir. 1979)	31
Whitney v. California. 274 U.S. 357 (1927)	8
Wolff v. McDonnell, 418 U.S. 539 (1974)	7

Contents

Page

Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988) ("Wood I"), *reh'g granted and opinion modified by*, 879 F.2d 583 (9th Cir. 1989) ("Wood II"), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990) 34, 35, 37, 38

Zinermon v. Burch, 494 U.S. 113 (1990) 6

Statute Cited:

42 U.S.C. § 1983 .....2, 3, 14, 16, 17, 18, 34, 35

United States Constitution Cited:

Fourth Amendment 28, 29

Fourteenth Amendment 2, 11, 16, 18, 22, 29, 31, 37, 41

Other Authorities Cited:

American Law Institute, Model Penal Code § 2.02(c) . 13, 14

Blacks Law Dictionary, 104 (6th ed. 1990) 6

Mitchell J. Edlund, Note, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander is Injured*, 30 Val. U. L. Rev. 161 (1995) 15, 16

John Hart Ely, *Democracy And Distrust*, 18 (1980) ... 7

Contents

Page

Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309 (1993) 15

Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 Geo. Wash. L. Rev. 417 (1992) 25

Walter Lippman, *The Good Society*, Ch. 15 (1937) *reprinted in The Essential Lippman*, 172 (Rossiter & Lane ed. 1982) 8

Jerry L. Mashaw, *Due Process In The Administrative State*, 5 (1985) 7

Richard A. Posner, *Overcoming Law*, 179 (1995) 7

Edward L. Rubin, *Generalizing the Trial Model of Procedural Due Process: A New Basis for the Right of Treatment*, 17 Harv. C.R.-CL. L. Rev. 61 (1982) ... 7

Laurence H. Tribe, Constitutional Law § 10-7 (2d ed. 1988) 17

Restatement (Second) of Torts § 500 14

STATEMENT OF FACTS

On May 22, 1990, petitioner James Everett Smith, a Sacramento County sheriff's deputy, struck and killed a 16-year-old motorcycle passenger, decedent Philip Lewis, with his patrol car at the culmination of a high-speed chase just after the motorcycle stopped in the roadway at the request of the passenger decedent Lewis. (J.A. 237, 240, Willard Dep. Ex. A, p.1 & Ex. B, p.1, D. Ct. 96).

That evening at about 8:30 p.m., Sacramento County deputy Smith and Sacramento City police officer Murray Stapp responded to a call to break up a fight. Immediately thereafter they returned to their separate patrol cars which were parked in close proximity to each other. Petitioner Smith saw Stapp activate his overhead lights and yell "something" at two boys on a motorcycle as it was passing between the patrol cars at a very slow speed. Petitioner Smith, whose windows were closed and could not hear what officer Stapp had yelled, immediately made a three-point turn and initiated a high-speed pursuit as the motorcycle accelerated away. Neither boy had been involved in the fight to which the officers had responded. Brian Willard was driving the motorcycle, and Phillip Lewis, the decedent, was a passenger. Both boys were minors; Lewis was sixteen. (*Lewis v. Sacramento*, 98 F.3d 434, 436 (9th Cir. 1996)).

The chase occurred at night on residential streets, through four stop signs and three 90-degree left turns, with officer Smith reaching speeds of 100 miles per hour in an area with a posted speed limit of 30 mph. (J.A. 240). During the chase, petitioner Smith came within 100 feet of the motorcycle although he was driving at speeds that would require at least 650 feet to stop his car. (J.A. 241). As defendant Smith was aware, the motorcycle afforded its occupants no protection whatsoever for impact, had no seat belts and was carrying a helpless passenger who could not control the motorcycle and who was not wearing a helmet (J.A. 241).

When petitioner Smith decided to initiate the chase, he did so without any justifiable or rational law enforcement purpose; without knowledge of any violation of the law by the occupants of the

motorcycle at that time; and admittedly without any knowledge of why he was even chasing them. (J.A. 222).

In conducting the high-speed chase, petitioner Smith directly violated the policy of the Sheriff's Department. Petitioner Smith never communicated with a supervisor as he was required to do. (J.A. 222). Additionally, counter to department policy, petitioner Smith refused to terminate the chase although the danger to the unprotected victim passenger and the general public clearly outweighed any need for apprehension, as the only known offenses were committed during the chase, by the driver of the motorcycle, and only in response to the chase. (J.A. 222)

Road conditions just prior to impact with Philip Lewis were visually obstructed by an incline in the road that was immediately followed by a downgrade. (J.A. 225, 240-241). Petitioner Smith continued the pursuit despite his awareness of these conditions, and at a speed which outran his headlights, his ability to see and his ability to stop. (J.A. 223-225, 240-242). As such, petitioner Smith egregiously violated the motor vehicle code, and acted to the mortal detriment of the trapped teenage passenger, decedent Philip Lewis. (J.A. 218, 240, 242). The impact of defendant Smith's 4,000-pound vehicle killed young Philip Lewis and sprayed his blood over the entire windshield as it ruptured virtually every major organ in his body, hurled him almost 70 feet down the highway, and fractured his skull before he finally came to rest. (Smith dep. 90, J.A. 218-221, 240, 242). Petitioner Smith's vehicle impacted both the motorcycle and decedent Lewis after the motorcycle had been stopped in the roadway for approximately two seconds (J.A. 219-221, 224).

Plaintiffs, Respondents herein, filed suit alleging deprivation of their son's Fourteenth Amendment due process rights in violation of 42 U.S.C. § 1983 in the Sacramento County Superior Court against petitioners Sacramento County, Sacramento County Sheriffs Department and Sacramento County Deputy Smith. Petitioners removed to Federal Court on the basis of federal question

jurisdiction and later moved for summary judgment on numerous grounds. The Federal District Court granted summary judgment for the County, finding deputy Smith was entitled to qualified immunity and that the County was not liable under *Monell v. New York City Dept. Of Social Services*, 436 U.S. 658 (1978). Plaintiffs appealed. The Ninth Circuit Court of Appeals reversed, denying deputy Smith qualified immunity and indicating that the minimum standard for determining *a high speed chase* (and not every) Fourteenth Amendment violation under 42 U.S.C. § 1983 is "deliberate indifference" or "reckless disregard". The Court, however, affirmed the lower court's ruling that the County was not liable. Petitioners petitioned for certiorari on three grounds (J.A. I):

I. Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment is "shocks the conscience" as determined by this Court in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115 (1992) and other Circuit Court cases or is "deliberate indifference" or "reckless disregard" as determined by the Ninth Circuit in this case.

II. Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment was clearly established for the purpose of granting qualified immunity to a peace officer when there is a conflict in that legal standard between the decision by this Court in *Collins*, and by other Circuit Courts of Appeal requiring conduct that "shocks the conscience" and the holding by the Ninth

Circuit in this case that the conduct be "deliberately indifferent."

III. Whether a police officer involved in a police pursuit is entitled to qualified immunity when a reasonable officer could not have known he may be violating the law due to conflicting legal standards of conduct and where the factual contours of the legal standard are not sufficiently defined.

SUMMARY OF ARGUMENT

1. When applied to government officials' conduct that deprives a person of life and liberty, the Due Process Clause's purposes are best served by defining the minimum level of culpability by a "reckless disregard" or "conscious indifference" standard. Holding government actors accountable under such a standard, which incorporates an identifiable and familiar test, provides a sufficient level of deterrence for arbitrary deprivations of life and liberty, yet does not trivialize federal constitutional rights by converting them into duplicates of common law tort. In contrast, the "shocks the conscience" standard proposed by the petitioners finds support neither in the Supreme Court's precedents nor in the purposes of the Due Process Clause. Petitioners and some lower courts have placed undue and erroneous reliance on language from *Collins v. Harker Heights*, 503 U.S. 115 (1992), to create this standard which is clearly inconsistent with this Court's earlier decision in *Daniels v. Williams*, 474 U.S. 327 (1986). *Daniels* held that intentional conduct, whether conscience-shocking or not, represents the maximum threshold for a legally cognizable deprivation of the core protected rights of life or liberty. Moreover, a "shocks the conscience" standard would undermine the Due Process Clauses' fundamental purpose of protecting explicit constitutional interests in life and liberty from arbitrary abuses of government authority.

2. Good faith qualified immunity does not become available

to officers on the basis that a later case or a case from a different circuit redefines, or overrules, the standard or the conduct. Otherwise an officer can always speculate that a later decision or a decision from a different circuit may exonerate that officer from liability or grant that officer immunity. Good faith qualified immunity should not be made available to petitioner Smith since the law was sufficiently clear in the Ninth Circuit at the time of the incident to put any reasonable police officer on notice that he would be held accountable for a violation of constitutional rights, and specifically the right to due process under the Fourteenth Amendment, for the sufficiently egregious, outrageous, abusive, and arbitrary conduct exhibited by Officer Smith during the high-speed pursuit which directly caused decedent Lewis' death. Nor could Officer Smith, or any reasonable Sacramento County Sheriff's deputy, believe that said conduct was lawful under existing law, common sense, or the written Sacramento County General Order concerning pursuits.

ARGUMENT

I.

IN LIGHT OF PRECEDENT AND THE FUNDAMENTAL RATIONALE FOR CONSTITUTIONAL PROTECTION AGAINST ARBITRARY GOVERNMENT DEPRIVATIONS, THE DUE PROCESS CLAUSE IS VIOLATED BY GOVERNMENT OFFICIALS' RECKLESS CONDUCT THAT DEPRIVES A PERSON OF LIFE OR LIBERTY.

The Fourteenth Amendment's Due Process Clause represents a constitutional protection of an individual's right to, and a safeguard against unwarranted government deprivations of, three fundamental, core, textural interests — life, liberty, and property. U.S. Const. amend. XIV. It operates as a barrier against arbitrary abuses of governmental authority. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Collins v. Harker Heights*, 503 U.S. 115, 126-27 (1992); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). In this context, government actions that deprive persons of life or liberty are

unconstitutionally arbitrary when they have no appropriate justification or take place without any regard for the regularity of governmental processes they are "without adequate determining principle." Black's Law Dictionary, 104 (6th ed. 1990). The process aspects of the Clause guard against arbitrariness by ensuring some level of procedural regularity in government actions that otherwise legitimately take away a protected interest. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990). In its well-established "substantive" component, the Due Process Clause holds that, without regard to the process provided, certain government deprivations of these protected interests are not permissible because they represent a constitutionally unacceptable level of abuse of governmental authority. *Daniels*, 474 U.S. at 331-32.

This Court has specifically stated "history reflects the traditional and common sense notion that the Due Process Clause, like its forebearer in the Magna Carta . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government' " *Id.* at 331 (citations omitted) (quoting *Hurtado v. California*, 110 U.S. 516 (1884) and Bank of *Columbia v. Okley*, 17 U.S. 235, 244 (1819)). In the early years of the republic, the due process concept had already begun to evolve. In his famous argument before the Supreme Court in *Dartmouth College v. Woodward*, 17 U.S. 518 (1819), Daniel Webster spoke of due process as "law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." *Id.* at 581. Webster's description suggests that due process was becoming a more demanding standard, which imposed on government a duty to act with care, deliberation[1], and reasonableness, and not

1. The duty of deliberation and inquiry — a fair and appropriate decision-making process — prior to a Government's action against life, liberty and property is the special office of procedural due process. *See, e.g., Maihews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970). At a minimum, the principles seek to "minimize the risk of erroneous decisions." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979).

recklessly, arbitrarily or in conscious disregard of law. Due process, and the interests it protects, form a "a rational continuum which broadly speaking includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Moore v. East Cleveland*, 431 U.S. 494, 501 (1977) (quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J.) (dissenting opinion)).[2]

Though the distinction between substance and procedure is not always clear and sharp,[3] and though controversy continues to surround the very language of substantive due process,[4] the United

2. *See also e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (Stevens, J.) (plurality opinion) (substantive due process principles continue to place some limits against punitive damages that are "plainly arbitrary and oppressive," and "general concern of reasonableness . . . properly enter into the constitutional calculus") (quoting *Pacific Mutual Life Ins., Co. v. Halsip*. 499 U.S. 1, 18 (1991)); *id.* at 2724-2725 (Constitution's "fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property") (Kennedy, J., concurring); *id.* at 2728 (urging "sufficient constitutional scrutiny to restore fairness in what is rapidly becoming an arbitrary and oppressive system") (O'Connor, I., dissenting); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("[t]he question . . . is whether . . . the University acted arbitrarily."); *Wolff v. McDonnell*, 418 U.S. 539-558 (1974) ("the touchstone of due process is protection of the individual against arbitrary action of government").

3. *See, e.g.*, Edward L. Rubin, *Generalizing the Trial Model of Procedural Due Process: A New Basis for the Right of Treatment*, 17 Harv. C.R.-CL. L. Rev. 61, 69 (1982). *See also e.g.*, Jerry L. Mashaw, *Due Process In The Administrative State*, 5 (1985) (questions of substance and process are "functionally inseparable").

4. Substantive due process "stinks in the nostrils of modern liberals and modern conservatives alike, because of its association with Dred Scott's case [60 U.S. 393 (1857)] and with *Lochner [v. New York*, 198 U.S. 45 (1905)] and the other freedom of contract cases, because of its formlessness, . . . and because it makes a poor match with the right to notice and hearing that is the procedural content of the clause." Richard A. Posner, *Overcoming Law*, 179-180 (1995). *See also* John Hart Ely, *Democracy And Distrust*, 18 (1980) ("we apparently need periodic reminding that 'substantive due processes' is a contradiction in terms — sort of like 'green pastel redness' ").

States Supreme Court has never wavered in its conclusion that the original, core principle of the Due Process Clause protects the individual from *arbitrary* government action.[5] *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). In a basic sense then, this case implicates the original purposes of due process: the problem of defining, however imprecisely, the limits on the methods and the manner by which government officers act in the execution and enforcement of the law.

While this Court has cautiously guarded the contours of the Due Process Clause's so-called "substantive" component, *see, e.g., Collins*, 503 U.S. at 125, substantive due process remains an important and foundational element of American constitutional law. This is particularly so where, as here, the deprivation affects core interests expressly protected by the Clause's text — life, liberty, or property. Nonetheless, the Court has held that not every governmental act that impairs these important constitutional interests violates the Constitution. The Court has confined the scope of the Due Process Clause to govern actions that threaten the basic values underlying the Clause. Those values are unquestionably threatened by government conduct that consciously and recklessly imperils life by disregarding its citizens' safety.

---

5. When judges, lawyers and political philosophers discuss core meanings of due process, the word "arbitrary" is a favorite. *Compare e.g., Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J.) ("Those who won our independence believed . . . that in its government the deliberative forces should prevail over the arbitrary") with Walter Lippman, *The Good Society*, Ch. 15 (1937) *reprinted in The Essential Lippman*, 172-73 (Rossiter & Lane ed. 1982) ("The denial that men may be arbitrary in human transactions is the higher law. . . . By this higher law all formal laws and all political behavior are judged in civil societies. . . . If the sovereign himself may not act willfully, arbitrarily, by personal prerogative, then no one may. His ministers may not. The legislature may not. Majorities may not. . . . This law which is the spirit of law is the opposite of an accumulation of old precedents and new fiats. By this higher law, that men must not be arbitrary, the old law is continually tested and the new law reviewed.")

A. Conduct That is Deliberately Indifferent to or Shows a Reckless Disregard for Expressly Protected Constitutional Life and Liberty Interests Is an Arbitrary Abuse of Power Cognizable as a Violation of the Due Process Clause.

Demonstration of a government official's recklessness is surely sufficient to establish the type of arbitrary abuse of government authority and power contemplated by the Due Process Clause. This Court has held that merely negligent, unintentional governmental actions that impair an individual's protected interests, do not amount to "deprivations" within the meaning of the Due Process Clause. *Daniels*, 474 U.S. at 332; *Davidson v. Cannon*, 474 U.S. 344, 348 (1986).[6]

---

6. Even this holding was sharply criticized in the companion case of *Davidson, supra*, by Justices Blackmun and Marshall:

> It is one thing to hold that a commonplace slip and fall, or the loss of a $23.50 hobby kit, see Parratt v. Taylor, supra, does not rise to the dignified level of a constitutional violation. It is a somewhat different thing to say that negligence that permits anticipated inmate violence resulting in injury, or perhaps leads to the execution of the wrong prisoner, does not implicate the Constitution's guarantee of due process. When the State incarcerated Daniels, it left intact his own faculties for avoiding a slip and a fall. But the State prevented Davidson from defending himself, and therefore assumed some responsibility to protect him from the dangers to which he was exposed. In these circumstances, I feel that Davidson was deprived of liberty by the negligence of the prison officials. Moreover, the acts of the state officials in this case may well have risen to the level of recklessness. *Id.* at 349.

and

> It is important not to confuse negligence with the absence of deliberate action. Negligent acts are often

(Cont'd)

The majority in *Daniels* expressly noted that "petitioner

(Cont'd)

> deliberate. W. Prosser, D. Dobb, W. Keeton, & D. Owen, Prosser and Keeton on Law of Torts, § 31, p. 171 (5th ed. 1984); see, e.g., The Germanic, 196 U.S. 589, 25 S. Ct. 317, 49 L. Ed. 610 (1905). Respondents Cannon and James did not act inadvertently. They deliberately decided that the threat to Davidson was not serious. Whether conduct is denominated negligent or intentional can be a function of the likelihood that harm will occur. Where occurrence of the harm is substantially certain, the law imputes to the actor an intent to cause it. Restatement (Second) of Torts § 8A, Comment b (1965). Where harm is less certain, we may call the actor negligent. W. Prosser and W. Keeton, supra, at 170. In some circumstances, the risk of injury is so high that the government's failure to make efforts to avoid the injury is unacceptable, even if its omission still might be categorized as negligence. *Id.* at 353.

and

> In contrast, where the State renders a person vulnerable and strips him of his ability to defend himself, an injury that results from a state official's negligence in performing his duty is peculiarly related to the governmental function. Negligence in such a case implicates the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pape, 365 U.S. 167, 184, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492 (1961), quoting United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368 (1941). The deliberate decision not to protect Davidson from a known threat was directly related to the often violent life of prisoners. And protecting inmates from attack is central to one of the State's primary missions in running a prison —

(Cont'd)

conceded that respondent was *at most negligent*. Accordingly, this case *affords us no occasion* to consider whether something less than intentional conduct, such as recklessness or 'gross negligence' is enough to trigger the protections of the Due Process Clause," *Daniels* at 334 n.3 (emphasis added), the majority in the companion case, *Davidson v. Cannon*, 474 U.S. 344 (1986), *suggested* that at least *deliberate indifference* was enough to invoke Fourteenth Amendment safeguards when it stated:

> Petitioner's claim, based on respondents' negligence, is quite different from one involving injuries caused by . . . another prisoner where officials simply stood by and permitted the attack to proceed, *see Curtis v. Everette*, 489 F.2d 516 (CA3 1973), *cert. denied sub nom., Smith v. Curtis*, 416 U.S. 995, 94 S. Ct. 2409, 40 L. Ed. 2d 774 (1974). *Davidson* at 348.

Three Justices of this Court, however, have addressed the issue directly stating ". . . official conduct which causes personal injury due to *recklessness* or *deliberate indifference*, *does deprive* the victim of liberty within the meaning of the Fourteenth Amendment." *Davidson* at 349 (J. Brennan dissenting). And further:

> Even if negligence is deemed categorically

(Cont'd)

> the maintenance of internal security. See Hudson v. Palmer, 468 U.S. 517, 524, 104 S. Ct. 3194, 3199, 82 L. Ed. 2d 393 (1984). The Fourteenth Amendment is not "trivialized," see Daniels, ante, 474 U.S. at 332, 106 S. Ct. at 665, by recognizing that in some situations negligence can lead to a deprivation of liberty. On the contrary, excusing the State's failure to provide reasonable protection to inmates against prison violence demeans both the Fourteenth Amendment and individual dignity. [FN6] *Id.* at 355-356.

insufficient to cause a deprivation under the Fourteenth Amendment, *recklessness must be sufficient*. Recklessness or deliberate indifference is all that a prisoner need prove to show that denial of essential medical care violated the Eighth Amendment's ban on cruel and unusual punishments. See Estelle v. Gamble, 429 U.S., at 104, 97 S. Ct. at 291. The Due Process Clause provides broader protection than does the Eighth Amendment, see, e.g., Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); Wolff v. McDonnell, 418 U.S. at 557-558, 94 S. Ct., at 2975; Revere v. Massachusetts General Hospital, 463 U.S. 239, 244, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605 (1983), so a violation of the Due Process Clause certainly should not require a more culpable mental state. *Davidson* at 358 (J. Blackmun dissenting, J. Marshall joining dissent) (emphasis added).

A reckless intent standard, however, entails a substantially greater type and degree of deliberateness and fault than a negligence standard. As opined in *Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992):

> However, reckless intent does not require that the actor intended to harm a particular individual; reckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and *unreasonable disregard* of the consequences. *Archuleta v. McShan*, 897 F.2d 495, 499 & n.8 (10th Cir. 1990). Thus reckless intent involves disregard of a particular risk rather than intent to cause a particularized harm. (Emphasis added).

Very recently, this Honorable Court in *Board of County Comm'rs of Bryan County, Oklahoma v. Brown*, 117 S. Ct. 1382 (1997), indicated that: "'[d]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action" *Id.* at 1391 (Souter, J., dissenting) ("Deliberate indifference is thus treated, as it is elsewhere in the law, as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes."[7] *Id.* at 1395.

The Model Penal Code, § 2.02(c), similarly defines recklessness as conscious disregard of "a substantial and *unjustifiable* risk." (Emphasis added). Or similarly "intentionally doing an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" *Britt v. Little Rock*, 721 F. Supp. at 192. (Cited by petitioners as the standard for review of Fourteenth Amendment

---

7. In *Bryan County*, Justice Souter includes a footnote that compares the concept of "deliberate indifference," used to determine municipal liability with other definitions of recklessness, including the definition of the Model Penal Code. *Id.* at n.1. *See, e.g., Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990) (recklessness includes an element of deliberateness — a conscious, acceptance of a known, serious risk); *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc) (recklessness contains an intent component because reckless disregard of a great risk is a form of knowledge or intent), *cert. denied*, 489 U.S. 1065 (1989); *Leffall v. Dallas Indp. Sch. Dist.*, 28 F.2d at 531 (deliberate indifference suffices to state a substantive due process claim); *Fagan v. City of Vineland*, 77 F.3d 1306-08; *Hill v. Shobe*, 93 F.3d at 421 (culpability standard requires proof a defendant is criminally reckless, which is a proxy for intent).

claims under § 1983 in their original motion for summary judgment in the District Court and reiterated in Petitioners Appellee's [sic] Brief response to the Ninth Circuit, see argument below.)[8]

Where government officials who are empowered with authority and equipped with materials such as guns or motor vehicles to carry out their public duties act recklessly, the deprivations they cause are arbitrary in the most basic sense. Officials' reckless conduct

---

8. Judicial and legal definitions of "reckless conduct" seem to follow similar, though not identical, patterns of assessing both objective factors — such as the degree or unreasonableness of risk and subjective factors — such as awareness, knowledge and intent. For example, according to the American Law Institute:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent

American Law Institute, Restatement (Second) of Torts § 500. The Model Penal Code offered the following definition of 'reckless' conduct to determine culpability under criminal law:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

American Law Institute, Model Penal Code § 2.02(c).

reflects a conscious disregard for a highly foreseeable risk that they will deprive any person who happens to be in their path of a fundamentally protected life or liberty interest. This is not a simple negligence case involving a car accident. Anyone can drive carelessly, but only government officers are cloaked with the authority to drive at high speeds in specified situations. *Fagan v. City of Vineland*, 22 F.3d 1296, 1327 (3d Cir. 1994) (en banc) (Cowen, J., dissenting) ("A recklessly conducted car chase involves an abuse of police power uniquely vested in the government"). To absolve the misuse of that power in cases where an individual officer's conduct demonstrates a conscious and reckless disregard for the life and liberty of the citizens he is sworn to protect would be to condone the type of arbitrary deprivations the Due Process Clause prohibits.

Moreover, a reckless intent standard furthers the Due Process Clause's concern with arbitrary abuses of governmental authority by systematically deterring acts that reflect a conscious disregard for life and liberty.[9] The Due Process Clause serves its predominant purpose when it establishes "incentives adequate to keep government, overall and on average, tolerably within the bounds of the law." Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 311 (1993) ("Fallon"). Recognition that Officer Smith's conduct violated the Due Process Clause would not lead to an unwarranted expansion of civil rights claims, but would instead establish a safeguard against egregious abdication of government responsibility and duty toward its citizens' safety, security, and bodily integrity. Indeed, the Due Process Clause seems a particularly appropriate mechanism to check abuse of government power given the apparently widespread threat to life and liberty resulting from high speed operation of police vehicles. *See* Mitchell J. Edlund, Note, *In the Heat of the Chase: Determining Substantive Due*

---

9. Deterrence is particularly likely under this standard since recklessness assumes an element of conscious, deliberate, or intentional choice. *Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990).

Process Violations Within the Framework of Police Pursuits When an Innocent Bystander is Injured, 30 Val. U. L. Rev. 161, 161 n.2 (1995) (citing studies of number of accidents resulting from high speed police pursuits; *see also* Amicus Brief by STOPP)

B. Recognizing Reckless or Indifferent Conduct as a "Deprivation" Would Not Implicate the Same Concerns Surrounding Negligent, Unintentional Acts.

At the heart of this Court's narrowing interpretation of the Due Process Clause in *Daniels* and *Davidson* is a concern that the Fourteenth Amendment, through the procedural enforcement vehicle of § 1983, would become a "font of tort law," supplanting in many senses remedies fully available under state law. *See, e.g., Paul v. Davis,* 424 U.S. 693, 701 (1976). This Court feared that interpreting the Due Process Clause to encompass such acts would unnecessarily convert many run-of-the-mill tort actions into constitutional cases. This possibility, in turn, presents two potential problems. First, application of the Due Process Clause to such conduct trivializes the important values underlying its central position in constitutional law. *Daniels*, 474 U.S. at 332. Second, the Clause's enforcement against merely negligent conduct implicates federalism concerns regarding the federal courts' overreaching into the traditionally sovereign functions of local and state government policymaking. Fallon, *supra,* at 309 & n.3.

Neither of these concerns is implicated by applying the Due Process Clause's application to reckless deprivations of life or liberty. The reckless intent standard, which must be understood for what it is — a qualitatively greater type and heightened degree of mental culpability should satisfy the Court's concerns about limiting the scope of cognizable due process violations. Indeed, it is surely no constitutional triviality to impose limitations on the government's misuse of power to arbitrarily and recklessly deprive persons of their life or property. A recklessness standard affords an appropriate level of deterrence without unduly burdening local governments or the federal courts with having to respond to and manage an

onslaught of what are essentially common law tort cases. Laurence H. Tribe, Constitutional Law § 10-7 n.10 (2d ed. 1988) ("the degree of culpability and abuse suggested by this heightened level of irresponsibility ought to suffice to satisfy the Court's view of a deprivation").

This Court's concern with the vague terms of the Due Process Clause becoming a "font" of tort law was largely addressed in *Daniels.* By eliminating negligent deprivations of life, liberty, and property from the constitutional landscape, the Court's decision swept away a substantial percentage of legal claims that could conceivably be brought under § 1983. In contrast, the courts' application of a recklessness standard would not convert the category of due process cases involving high speed operation of police vehicles into a mirror image of common law tort. In cases such as this one, little danger exists that applying a recklessness standard would open the litigation floodgates. Rather, the facts in this case, read in the light most favorable to the plaintiff, represent an extraordinary scenario that could hardly be viewed as a run-of-the-mill tort. As the Ninth Circuit stated, even after a petition en banc, "Smith must have known he was placing Lewis and Willard in great physical danger. Any reasonable officer would have known of this danger. No reasonable officer could have believed such conduct was completely immune from liability." *Lewis* at 445.

Respondents submit that to reject a "recklessness" standard based on this Court's admonitions regarding the conversion of the Due Process Clause into a "font of tort law," would be to confuse fears about converting standard tort claims into cases of constitutional magnitude with the common practice of importing common law tort liability principles into the definition of the Constitution. This Court has long recognized that § 1983 should be read against the background of tort liability. *Monroe v. Pape,* 365 U.S. 167, 187 (1961), *overruled on other grounds, Monell v. Dept. of Social Services,* 436 U.S. 658 (1978). Moreover, this Court regularly establishes constitutional tests or standards by which the

courts must judge the lawfulness of government conduct, often incorporating common law principles governing mental state and culpability. The Fourth Amendment's guarantees against unreasonable government searches and seizures, as just one example, mirror the common law negligence standard.

Finally, even if recognizing a constitutional tort action here might overlap somewhat with some common law tort liability, the Supreme Court's decision in *Monroe, supra*, 365 U.S. at 183, clarified that § 1983 was intended to provide a supplementary remedy, even where the underlying conduct is also forbidden by the state constitution and laws. This should be especially true when most states expressly provide some type of immunity or other for their officers or themselves, *see, e.g.*, Amicus Brief of the National Association of Counties, etc., *et al.*, at 28.

C. Petitioners Themselves Conceded That Reckless Conduct Was Sufficient to Establish a Fourteenth Amendment Violation and Should Not Be Estopped to Contend Otherwise.

Throughout this litigation the petitioners themselves have contended that the courts should apply a "reckless disregard," or "deliberate indifference" standard to determine deprivations of life under the Fourteenth Amendment substantive due process clause during a police pursuit. It is only now that the Ninth Circuit has ruled that officer Smith's conduct easily rose to such a degree of egregiousness that petitioners wish to direct a changed plea to this Court to heighten the standard to "shocks the conscience" under *Collins, supra*, decided Feb. 20, 1992. Petitioners failed, however, to even cite that case, let alone the proposition for which petitioners contend it stands, when they moved for summary judgment on November 11, 1992 or when they filed their Appellee's [sic] Brief in the Ninth Circuit on November 15, 1993. In their motion for summary judgment before the trial court, dated November 11, 1992, the petitioners clearly conceded:

> Therefore, in order for LEWIS' Fourteenth Amendment violation claim to succeed, plaintiffs must prove that there was at least recklessness, defined as "intentionally doing an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow", on the part of the defendants. *Britt v. Little Rock*, 721 F. Supp. at 192.[10] Additionally, they must show that defendants' conduct was so irrational and arbitrary, so unjustified by any circumstance or governmental interest, as to literally be incapable of avoidance by any pre-deprivation procedural protection. *Daniels v. Williams*, 474 U.S. at 331, *Rucker v. Hartford County, MD*, 946 F.2d at 281.

J.A. at 42.

And similarly, in their Appellee's [sic] Brief in the Ninth Circuit Court of Appeals, dated November 15, 1993, at pg 10:

> Defendants respectfully submit that the approach taken by the District Court in *Britt*

---

10. In *Britt, supra*, defendant Officer Harmon, testified (and was the only testimony) that he "did not see the actual accident because the stolen car had disappeared through a dust cloud." After an analysis of various decisions the Court concluded:

> Cases after Daniels and Davidson have generally agreed that recklessness, which may be defined as "intentionally doing an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow," Prosser & Keeton, Torts, at 212, is sufficiently like intent that due process is implicated. *Id.* at 192.

v. Little Rock Police Department, 723 F.Supp. 189 (E.D. Ark. 1989), is appropriate for the closely analogous facts of this case. In Britt, a police officer struck and killed the plaintiff while in a high-speed pursuit of a car thief. (*Britt v. Little Rock Police Department*, 723 F.Supp. at 190.) After thoroughly reviewing the United States Supreme Court cases which established the "greater than negligence, but less than intentional" standard for substantive due process and the Supreme Court's decision in *City of Canton v. Harris* which questioned the propriety of a "gross negligence" standard, the District Court determined that a Section 1983 cause of action could not stand upon such a low standard as gross negligence. (*Id.* at 193). To support its decision the court quoted from *Cannon v. Taylor*, 782 F.2d 947, 950 (5th Cir. 1986), where the court held that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no Section 1983 cause of action for violation of a federal right." (*Id.*) The court also quoted from the Seventh Circuit case of *Archie v. City of Racine*, 947 F.2d 1219-20 (7th Cir. 1988) (en banc), showing that other circuits had resoundingly rejected the standard of gross negligence as too indistinct from simple negligence. (*Id.*)

Defendants respectfully submit that the United States Supreme Court's decision in *City of Canton v. Harris* illustrates that the

> proper standard in judging the level of culpability required in substantive due process analysis is that of "deliberate indifference."

It would seem vastly unfair for the petitioners to now complain that the Ninth Circuit followed defendants' pleas, recommendations and "submissions" and applied the "reckless disregard", "deliberate indifference" standard. Apparently petitioners were content with this standard until they realized that petitioner Smith's conduct easily satisfied it. Petitioners, therefore, now wish to "raise the bar" to "shocks the conscience" in hopes that this new standard will eliminate the Lewis' claims. Petitioners should be estopped from so doing.

D. A "Shocks the Conscience" Standard in Police Pursuit Cases Is Ambiguous and Unworkable, Would Not Provide Sufficient Deterrence, and Would Conflict with this Court's Due Process Cases Which Establish Intent as the Ceiling of Culpability.

Most circuits that have adopted the "shocks the conscience" standard in high speed police vehicle cases have relied heavily, if not exclusively, on this Court's decision in *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992).[11] *See Evans v. Avery*, 100 F.3d

11. Two other circuits adopted a "shocks the conscience" standard before this Court decided *Collins*. *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 720 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986). Since *Collins; Evans v. Avery*, 100 F.3d 1033, 1037-38 (1st Cir. 1996); *Fagan v. City of Vineland*, 22 F.3d 1296, 1311 (3d Cir. 1994); *Uhlrig v. Harder*, 64 F.3d 567, 573-74 (10th Cir. 1995). Other circuits that have addressed the issue explicitly or implicitly recognize that reckless intent is sufficient to establish an unconstitutional deprivation. *Morales v. New York State Dept. of Corrections*, 842 F.2d 27, 30 (2nd Cir. 1988) (deliberate indifference); *Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir. 1988) (deliberate indifference or reckless indifference), *cert denied*, 489 U.S. 1065, 109 S. Ct. 1338, 103 L. Ed. 2d

(Cont'd)

1033, 1037-38 (1st Cir. 1996), *cert. denied*, 65 U.S.L.W. 3611 (May 12, 1997); *Fagan v. City of Vineland*, 22 F.3d 1296, 1303-04 (3rd Cir. 1994) (en banc); *Williams*, 99 F.3d at 1014-15; *accord Uhlrig v. Harder*, 64 F.3d 567, 573-74 (10th Cir. 1995). Respondents submit that these courts have misread this Court's precedent and not accorded proper regard to the fundamental meaning of the Due Process Clause. Initially, the "shocks the conscience" language from *Rochin v. California*, 342 U.S. 165 (1952), has never been widely accepted or incorporated into mainstream constitutional law doctrine. The phrase has been repeatedly noted in numerous contexts, but ordinarily as a descriptive, and not a normative, term. *See, e.g., Collins*, 503 U.S. at 126, 128. Moreover, such a reading of *Rochin* is inconsistent with *Daniels*, which suggests that intentional conduct that interferes with a person's life or liberty, conscience-shocking or not, constitutes an unconstitutional deprivation. 474 U.S. at 331. *See also Fagan v. City of Vineland*, 22 F.3d 1296, 1311 (3d Cir. 1994) (en banc) (Cowen, J., dissenting).

A shocks the conscience standard is vague, ambiguous, subjective, and virtually unusable. Even Justice Douglas would not join in the majority opinion because the *Rochin* standard "is to make the rule turn not on the Constitution but on the idiosyncrasies

---

(Cont'd)
909 (1989); *but see Fagan v. City of Vineland, supra*; *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996) (criminal recklessness); *Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989) (implying recklessness is sufficient); *Lewis v. County of Sacramento*, 98 F.3d 434, 441 (9th Cir. 1996) (recklessness or deliberate indifference). *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (deliberate indifference), *cert. denied*, 489 U.S. 1065, 109 S. Ct. 1337, 103 L. Ed. 2d 808 (1989).

Claims in the Amicus Briefs for Petitioner that the Due Process Clause has no application in any automobile accident case (*see, e.g.*, Brief of Amicus Curiae City and County of Denver, Colorado at 8-13) is unsupported. All federal appellate courts that have addressed this issue agreed that at some level of culpability, government officials' deprivation of life or liberty by a high speed police vehicle implicates the Fourteenth Amendment.

of the judges who sit here." *Rochin*, 342 U.S. at 179. Just one year after *Rochin*, Justice Clark criticized the "shocks the conscience" test:

> [The shocks the conscience test] makes for such uncertainty and unpredictability that it would be impossible to foretell — other than by guesswork — just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action a conviction is overturned and a guilty man may go free. Rochin bears witness to this. *Irvine v. California*, 347 U.S. 128, 138 (1953).

Almost twenty years later, Justice Black argued:

> With a "shocks the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test willfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief or his politics. *Boddie v. Connecticut*, 401 U.S. 371, 393 (1971) (dissenting opinion).

More recently, Justice Scalia of this Honorable Court wrote:

> If the system that has been in place for 200 years (and remains widely approved) "shocks" the dissenters' consciences [citation omitted] perhaps they should doubt the calibration of their consciences or, better still,

> the usefulness of "conscience-shocking" as a legal test. *Herrera v. Collins*, 113 S.Ct. 853, 875 (1993).

In his dissenting opinion in *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994) (en banc), Justice Cowen, joined by Justices Becker, Sciria and Lewis, writes:

> There is no adequate reason for adopting a "shocks the conscience" test in this case. Even decisions of the Supreme Court have precluded the application of this test in factual allegation analogous to *Rochin*. Moreover, *Rochin* at most states that conduct that "shocks the conscience" suffices, but is not required, to state a claim of constitutional deprivation. In other words, it is a "sufficiency" test, not a "necessary" test. Even if the test is valid as a necessary test, it is "amorphous and imprecise," MajOp. at 1308, and defies definition. Thus, it is impractical. All these factors militate against adopting a "shocks the conscience" test. *Id.* at 1316.

Respondents submit that *Collins* did not dramatically redefine the level of culpability for Due Process Clause violations. The offhanded citation to *Rochin* has accumulated increasing, but undeserved, significance as lower courts have extrapolated it into a previously unfounded culpability standard. In *Collins*, this Court's emphasis was on the obligation of local governments to provide adequate training/warning to its employees regarding the possibility of hazardous working conditions. *Collins* appears to be first, and only, a case about the constitutional duty a government employer owes to its employees. 503 U.S. at 125-26, 127. Concluding that the government owed no such duty under the circumstances, *id.* at 128, 130, this Court needed to do no more; answering the threshold

duty question ended the controversy. Thus, the part of the opinion mentioning the shocks the conscience standard would appear, at best, to be dicta. *Fagan*, 22 F.3d at 1311-12 (Cowen, I., dissenting). Moreover, read in the context of this Court's discussion, the opinion describes conscience-shocking conduct as one way of demonstrating a substantive due process violation, but does not alter the understanding that arbitrary government deprivations of life and liberty violate the Due Process Clause. 503 U.S. at 127-30; *Fagan*, 22 F.3d at 1312 (Cowen, J., dissenting) (noting *Collins's* repeated references to arbitrariness).

It surely cannot be surprising that this Court did not explore the "shocks the conscience standard" in any detail in *Collins*. The issue about the state of mind required to establish a Due Process violation was neither an argument emphasized in the parties' briefs, nor does it appear to have even been addressed in oral argument. *See* Brief for Petitioner, Brief for Respondent, Reply Brief for Petitioner, *Collins v. Harker Heights*, 503 U.S. 115 (1992); Transcript of Oral Argument, 1991 WL 636281 (U.S. Nov. 5, 1991).

The shocks the conscience standard is also inappropriate because it would be inconsistent with *Daniels*. This Court unequivocally acknowledged that intentional governmental deprivations of life and liberty would still violate the Clause's terms, *Daniels*, 474 U.S. at 331, while not addressing whether reckless conduct that resulted in such deprivations would fall within the Fourteenth Amendment's parameters. *Id.* at 334 n.3. Thus, the question left open in *Daniels* was whether something more than negligent, but less than intentional, conduct could violate the Due Process Clause. *Id.* at 335 (describing negligence and intent as the two ends of the spectrum). *See also* Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 Geo. Wash. L. Rev. 417, 429 (1992) ("the Court has not yet determined where on the spectrum between negligence and intent a deprivation occurs") (emphasis added) ("*Making Sense*"). *Daniels* therefore establishes intentional

deprivation as the ceiling for defining a cognizable deprivation of the core interests of life and liberty.

Finally, a shocks the conscience standard would not provide sufficient deterrence of arbitrary government deprivations of life and liberty in cases such as this one. Government actors would be on notice that even the most reckless conduct would not result in any liability unless it went so far beyond some amorphous line that it shocked the conscience. The shocks the conscience standard, as others have argued, is too undefined to provide courts, law enforcement departments and their officers, or the general citizenry with a clear understanding of the scope of permissible government conduct. *Fagan*, 22 F.3d at 1319-20 (en banc) (Cowen, J. dissenting). Reckless intent, by contrast, while also subject to some variation, is an identifiable and familiar legal standard.

II.

QUALIFIED IMMUNITY IS NOT AVAILABLE TO PETITIONER SMITH SINCE THE LAW WAS SUFFICIENTLY CLEARLY ESTABLISHED AT THE TIME OF THE INCIDENT AND PETITIONER SMITH COULD NOT HAVE BELIEVED THAT HIS CONDUCT WAS LAWFUL.

A. The Law at the Time of the Incident Was Clearly Established and Provided Petitioner Smith with Adequate Notice That His Conduct During the Course of a Police Chase Violated the Constitutional Rights of the Respondent's Decedent.

Respondents submit that the law at the time of the subject incident was clearly established and provided adequate notice that the conduct complained of would violate federally protected rights. This Honorable Court has recently discussed qualified immunity in *United States v. Lanier*, 117 S. Ct. 1219 (1997). The Court in *Lanier* opined:

> [W]e have explained that qualified immunity seeks to ensure that defendants "*reasonably* can anticipate when their conduct *may* give rise to liability," *id.* at 195, by attaching liability only if "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson, supra* at 640, 107 S. Ct. at 3039.
>
> [G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful," *Anderson, supra*, at 640, 107 S. Ct. at 3039. *Id.* at 1227.

The Petitioners argue that the law was not clearly established at the time of the incident because there was a conflict among the circuits regarding the proper standard to be applied in substantive due process. Regardless of the standard employed, all courts considering police pursuit cases have held that the actions of officers during the course of high-speed pursuits may violate substantive due process if sufficiently egregious.[12]

Since the Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), it has been clearly established that the use of deadly force is not permissible to stop a fleeing felon. In *Garner*, this Honorable Court held unconstitutional "the use of deadly force to prevent the escape of an apparently unarmed suspected felon." *Id.* at 3. This Court further opined: "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is

12. *See* n.11 and cases cited in amicus brief by ATLA.

constitutionally unreasonable. It is not better that all felony suspects die than that they escape." *Id.* at 11. The Court concluded that such deadly force cannot be used unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id* at 3. As the Ninth Circuit found "*Garner* put Officer Smith on notice that he could not constitutionally stop Lewis with deadly force." *Lewis v. Sacramento*, 98 F.3d 434, 443.

Although the deadly force used in *Garner* was a bullet from a gun, a car can also be used as a deadly weapon. *See Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991) ("[L]ike using firearms, pursuing a vehicle at speeds in excess of 90 miles per hour over winding roads at night constitutes the use of deadly force. . . ."). Moreover, this Court had already held that law enforcement officers' use of deadly force during a high-speed vehicular pursuit may lead to § 1983 liability. *Brower v. County of Inyo*, 489 U.S. 593, 599-600, 109 S. Ct. 1378, 1382-83, 103 L. Ed. 2d 628 (1989) (use of roadblock can constitute unconstitutional use of deadly force when suspect involved in high-speed pursuit crashes into that roadblock). *Brower* put Officer Smith on notice that force other than a gun could constitute unlawful deadly force. *Brower* also put Smith on notice that he could be held liable for the use of deadly force to stop a suspect in the context of a high-speed pursuit. The Ninth Circuit, it is submitted, correctly held that "[c]ases involving law enforcement officers' excessive use of force in the context of unconstitutional seizures were sufficiently analogous to put Smith on notice that, if he caused death or injury to someone through sufficiently egregious conduct, he could be liable under § 1983." *Lewis* at 443.

While *Garner* involved a Fourth Amendment analysis because there was a seizure, its rationale should apply to substantive due process police chase cases because both scenarios involve the apprehension of a fleeing suspect and means utilized to effectuate the capture of the suspect. While the use of force to capture the

fleeing suspects in *Garner* was a bullet from a gun, common sense, now, at the time of *Frye*, and in May of 1990, indicated, and now indicates, that a vehicle traveling at excessive rates of speed is capable of killing or severely injuring any person in close proximity to the pursuit route. Furthermore, as respondents have always maintained, and as the Ninth Circuit Court of Appeals held:

> An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury. *Mendoza*, 27 F.3d at 1360. Common sense is relevant to the inquiry as to whether the contours of the right at issue were clearly established. See *Wood*, 879 F.2d at 590. *Lewis* at 444.

The main justification for allowing officers to engage in dangerous high-speed pursuits is the apprehension of criminals. However, as *Garner* points out, the apprehension of criminals has its limitations. Garner clearly recognizes that it is not permissible to use deadly force even if a person is suspected of committing a felony, let alone a motorcyclist who has committed no crime.

The application of *Garner* to the Fourteenth Amendment setting is even more compelling given the Court's opinions in *Graham v. Conner*, 490 U.S. 386 (1989) and *Brower, supra*. In *Brower*, the Court held that a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied." *Id.* at 597. Under the *Brower* analysis, accidents which occur during the course of a pursuit are not Fourth Amendment "seizures" unless the officer intentionally uses his vehicle to terminate the movement of a suspect or innocent third party. Further, in *Graham*, the Court rejected the "notion that all excessive force claims brought under § 1983 are governed by a single generic standard." *Id.* at 393. However, the Court in *Graham* further held that:

> [A]ll claims that law enforcement officers

> have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims. *Id.* at 395.

From *Graham*, it is clearly established that there is no one generic standard governing all applications of force by law enforcement officers, and that the substantive due process clause provides protection against governmental use of force where no other constitutional amendment provides an explicit source of protections.[13]

Finally, in *Daniels v. Williams*, 474 U.S. 327 (1986), this Honorable Court held that mere negligence was insufficient to state a claim for violation of substantive due process. However, the Court reserved the question of whether something less than intentional conduct such as recklessness or gross negligence was sufficient to state a substantive due process violation. This clearly put the petitioners on notice that reckless conduct might be sufficient to

13. *See also Pleasant v. Zamieski*, 895 F.2d 272 (6th Cir.1990) (noting that the Supreme Court's reasoning in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), likely "Preserve[d] Fourteenth Amendment substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right to life through means other than a law enforcement official's arrest, investigatory stop or other seizure"), *cert. denied*, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990).

violate substantive due process. Based on *Daniels*, and prior to the subject incident, almost every Court of Appeals which considered the issue has held that recklessness was sufficient to sustain a substantive due process claim.[14]

Accordingly, this Honorable Court's rulings in *Garner*, *Brower*, *Graham*, *Daniels* and *Davidson* clearly established that it was not constitutional to apprehend even fleeing felons through the use of deadly force (*Garner*); that police pursuits could infringe on the pursued's constitutional rights (*Brower*); that substantive due process under the Fourteenth Amendment provided protection against government force where no other constitutional amendment did so (*Graham*); and that something less than intentional conduct would probably suffice under the Fourteenth Amendment (*Daniels*).

In addition to *Garner*, *Brower*, *Graham* and *Daniels*, the Ninth Circuit appropriately cited three other pre-May, 1990 federal cases which put officer Smith on notice that he could be found liable for his conduct during a high-speed pursuit: *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989), *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987), and *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986). The Circuit Court of Appeal held:

> These cases sent a clear message that conduct that is sufficiently egregious may lead to § 1983 liability.
>
> In the first case, Roach, a police officer on

14. *See Germany v. Vance*, 868 F.2d 9 (1st Cir. 1989); *Wood v. Ostrander*, 851 F.2d 1212, 1214-15 (9th Cir.1988), *modified on reh'g*, 879 F.2d 583 (9th Cir.1989), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990); *Nishivama v. Dickson County, Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987); *Bass v. Jackson*, 790 F.2d 260, 262-63 (2d Cir. 1986); *Davidson v. O'Lone*, 752 F.2d 817, 828 (3d Cir. 1984), *aff'd*, 474 U.S. 344, 106 S. Ct. 662, 677, 88 L. Ed. 2d 662 (1986); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979); *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 192 (E.D. Ark. 1989); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988); *Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990).

patrol instituted a pursuit after running a license plate check on a car leaving the area of several recent burglaries and discovering that the car did not match the description of the car to which the plates were registered. During the course of the pursuit, the driver of the suspect car lost control and collided with a second car. The police officer "collided with the debris" from the accident. Roach, 882 F.2d at 295. Roach (the passenger in the suspect car) and the occupants of the second car sued the police officer for their injuries. Before Roach was decided, the Eighth Circuit had held negligent or grossly negligent conduct insufficient to state a claim under § 1983. In Roach, the court held the officer not liable, concluding that his conduct did not "rise to the level of gross negligence and, therefore, most certainly [did] not rise to the level of conduct which would sustain a claim under section 1983." Id. at 297. The court therefore affirmed the district court's dismissal for failure to state a claim. Id. at 298.

In Jones, the complaint alleged that police officers instituted a high-speed pursuit after spotting a car reported in a police bulletin to have been involved in a property damage accident. The officers also observed the car "being driven in an unsafe manner." Jones, 827 F.2d at 1103. During the pursuit, the suspect car crossed the center line of the highway, striking an oncoming car and killing its driver, Jones. Jones's wife sued the officers for her husband's death. Id. at 1104.

The Sixth Circuit held the officers not liable, concluding that "[t]he government conduct in pursuing [the suspect] does not rise to the level of gross negligence and outrageous conduct necessary to sustain a section 1983 claim." Id. at 1106. The court therefore affirmed the district court's dismissal for failure to state a claim for violation of any of plaintiff's constitutional rights. Id. at 1103.

In these two cases the police officers were found not liable for the deaths or serious injuries that resulted from the pursuits because their conduct was not sufficiently egregious. These two cases clearly indicate that an officer cannot pursue people with impunity-sufficiently egregious conduct can lead to liability.

In the third case, Checki, the Fifth Circuit concluded that intentional misuse of a police vehicle could constitute a § 1983 violation. Check, 785 F.2d at 538. The plaintiff, Checki, was a passenger in a car tailgated by an unmarked state police car. The driver of Checki's car attempted to evade the tailgating car, not knowing that it was a police car. The driver's evasive maneuvers led to a twenty-mile high-speed chase during which Checki and the driver were unaware that the pursuers were police. Checki filed a § 1983 action. The district court dismissed the suit on procedural grounds related to venue and statute of limitations. Id. at 535-36. The Fifth Circuit reversed and also commented on the merits of the case. The court stated that,

although "a police officer's negligent use of his vehicle will not constitute a § 1983 violation, . . . [i]t is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's intentional misuse of his vehicle." Id. at 538.

Each of these three cases, Roach, Jones, and Checki, sent a clear message that a police officer can be held liable if his conduct is sufficiently egregious, i.e., conduct somewhere beyond gross negligence. These cases put Smith on constructive, if not actual notice, that he could be sued for violating Lewis's Fourteenth Amendment due process rights during a police chase. Thus, the law regarding police liability for death or injury caused by an officer during the course of a high-speed chase was clearly established. If that officer's conduct was sufficiently egregious, he would be liable. *Lewis, supra,* at 444-445.

Petitioners seek to distinguish each of the cases cited by the Ninth Circuit in Lewis on the grounds that the conduct in those cases was held not to amount to a Fourteenth Amendment violation. However, the Ninth Circuit was not looking at the specific conduct but the announced reasoning that "sufficiently egregious" conduct *during a high-speed chase* would subject an officer to liability under § 1983. All officers must have been aware, especially after June, 1989, that the Ninth Circuit would hold an officer liable for "recklessly disregarding" an individual's rights. The Ninth Circuit had already held that either "gross negligence, recklessness, or 'deliberate indifference' " was sufficient to state a substantive due process violation. *Wood v. Ostrander*, 851 F.2d 1212, 1214 (9th Cir. 1988) ("Wood I"), *reh'g granted and opinion modified by*, 879

F.2d 583 (9th Cir. 1989) ("Wood II"), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990). Furthermore, relying on the standard set out in *Wood I*, the Court later held that "grossly negligent or reckless official conduct that infringes upon an interest protected by the Due Process Clause is actionable under § 1983." *Fargo v. City of San Juan Bautista*, 857 F.2d 638 (9th Cir. 1988). Although *Fargo* 's "gross negligence" standard was explicitly based on *Wood I*, which was modified on rehearing and superseded by *Wood II*, and although in *Wood II* the Ninth Circuit stepped back from the gross negligence standard, citing that the intervening Supreme Court decision of *City of Canton*, 489 U.S. 378, 109 S. Ct. 1197, had called it into question (*Wood II*, 879 F.2d at 588), the Ninth Circuit, the exact law under which officer Smith at a minimum operated, had already held that "recklessness, or deliberate indifference" and perhaps even "gross negligence" was sufficient to cause an officer to be accountable under § 1983. The additional cases cited by the Ninth Circuit in Lewis, even though unnecessary, further "clearly" extended the same scrutiny and accountability to the "high speed chase" context. Such extension, it is submitted, although unnecessary, should completely preclude Petitioners from arguing that, although the law was admittedly apparent in other contexts, it was not clearly established in the context of high-speed chases.

Standing alone, the cases cited by the Ninth Circuit are enough to extend the Court's previous rulings on the egregiousness necessary during a high-speed chase to constitute a constitutional offense actionable under § 1983. In addition, petitioners conceded in their opening brief before this Court that there were at least two more case that were available to a reasonable police officer: *Easterling v. City of Glennville*, 694 F. Supp. 911 (S.D. Ga. 1986) and *Britt v. Little Rock Police Dep't.*, 723 F. Supp. 189 (E.D. Ark. 1989).[15]

15. It should be noted that petitioners were well aware of *Britt* and cited this case in their original motion for summary judgment as defining (Cont'd)

Aside from other facts, it is glaringly obvious that in each of the cited cases, it was not the officer's vehicle which directly inflicted the harm. Moreover, it appears that Petitioners' position is that, in each case except *Easterling*, since the courts held under the particular facts that a constitutional violation had not occurred, officer Smith was entitled to the same judgment and immunity and that this should be true also in light of *Easterling* since the facts in officer Smith's pursuit were distinguishable. The problem is that facts are always distinguishable. No two cases are identical. It is only the general "contours" of the right which must be clearly established for qualified immunity to fail. As stated in *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S. Ct. 2727, 2738-2739:

> By defining the limits of qualified immunity in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an officer could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. (Citing in n.33, *Procunier v. Navaretto*, 434 U.S. at 565 quoting *Wood v. Strickland*, 420 U.S. at 322 "Because they could not reasonably have been expected to

(Cont'd)
the "at least recklessness" standard (*Id.* at 192) which the District Court should apply in deciding whether a due process violation occurred. Defendants' Motion for Summary Judgment dated November 11, 1992, J.A. 42, and in Appellee's [sic] Brief before the Ninth Circuit Court of Appeals dated November 15, 1993 at page 10 (stating that the facts in *Britt* were "closely analogous.")

> be aware of a constitutional right that has not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as being in good faith'.") But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Harlow, supra*, at 819.[16]

In this case it was obvious in May of 1990 that sufficiently egregious conduct during a high-speed chase implicated a constitutional right and specifically the rights guaranteed by the due process clause of the Fourteenth Amendment. No officer could conceivably believe after this Court's rulings in *Garner*, *Brower*, *Graham*, *Daniels* and *City of Canton* and the Courts of Appeals rulings in *Roach*, *Jones*, *Checki*, and *Wood* and the District Court rulings of *Easterling* and *Britt*, that a constitutional right was not implicated by sufficiently egregious conduct during a high-speed chase. Also, no reasonable officer could have believed that the conduct exhibited by officer Smith was lawful. *See Lewis* at 445. As stated in *Harlow* citing *Malley v. Biggs*, 475 U.S. 336, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986) "(qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law')." *Id.* at 344-345, 106 S. Ct. at 1097, 1098:

16. Originally in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, this Court explicitly held that "qualified immunity ... permits defeat of *insubstantial* claims without resort to trial." *Id.* at 800 (emphasis added). *See also* at 801 "defeat of insubstantial claims," and again at 808 "insubstantial suits" and "frivolous lawsuits," and at 818 "many insubstantial claims" Similarly, in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, this Court stated: that "... the driving force behind Harlow's substantial reformation of qualified immunity principals — that "insubstantial claims ... be resolved."

Petitioners then cite numerous cases since May of 1990, for the proposition that the legal standards keep changing and that some non appealed District Courts grant immunity under sets of individual facts at some times during the changing legal landscape. Such factors would appear irrelevant to an inquiry limited to the objective landscape of the law at the time of the incident as defined in *Harlow* and *Creighton*. Granting qualified immunity on later cases, or cases which overrule previous cases, or conflicting cases in other circuits, would be to encourage officials in hopes of obtaining immunity to: (1) search the cases ever wider in hopes of finding *any jurisdiction* which denied immunity, or as here argued, found a constitutional violation not to have occurred, with a fact pattern to which you may find some similarity; or (2) wait sufficiently long, by appeals or otherwise, in hopes that some court will overrule or cast doubt upon a previous holding. It would also "bind the circuit to decisions of others." *Boddie v. City of Columbus, Mississippi*, 989 F.2d 745, 748.

Based upon this Court's widely publicized rulings in *Garner*, *Brower*, *Graham*, *Daniels* and *City of Canton*, and the published rulings in *Roach*, *Jones*, *Checki*, *Wood*, *Easterling* and *Britt*, Petitioners were on sufficient notice that when an officer exhibits reckless disregard for, or deliberate indifference to, human life during the course of a high-speed pursuit resulting in injury, it would violate a person's constitutional rights. Respondents respectfully submit that the law at the time of the subject incident was clearly established and that petitioner Smith was not entitled to Qualified Immunity.

B. Neither Officer Smith, Nor Any Reasonable Officer with the Sacramento County Sheriff's Department, or Anywhere Else, Could Reasonably Believe That the Conduct Exhibited by Petitioner Smith in this Case Was Lawful.

Nor could any officer conceivably reasonably believe that constitutional rights were not implicated and violated by *intentionally initiating* and *continuing* a high-speed chase of a motorcycle with a trapped minor passenger who was unable to control the motorcycle, without even the protection afforded by a

helmet, for no articulable reason other than traffic infractions committed during the chase itself; without immediately communicating with the supervisor as he was required by written policy to do; outrunning his ability to see at night with his headlights; at speeds up to 100 miles per hour in a 30 mph area within 100 feet of the motorcycle when it would take 650 feet to stop; and then knowingly continuing over a blind hill in a residential community with the possibility of children and others on the other side; when the risks so clearly outweighed any possible legitimate law enforcement purpose or benefit; when the written policy required that the chase be terminated; and then hitting 16 year old Philip Lewis with his patrol car after the motorcycle stopped at the behest of Lewis, rupturing virtually every major organ and fracturing Lewis' skull as he was hurled over 70 feet down the pavement.

Deputy Smith had other reasons to believe that his conduct was unlawful that night and that he was not "immune" from liability. His Department Policy specifically stated:

> ALL PERSONS SHALL BE FAMILIAR WITH AND OBSERVE THAT PART OF THE VEHICLE CODE SECTION 21056 WHICH STATES THAT EXEMPTION FROM CERTAIN PROVISIONS OF THE CODE "... DOES NOT RELIEVE THE DRIVER OF A VEHICLE FROM THE DUTY TO DRIVE A VEHICLE WITH DUE REGARD FOR THE SAFETY OF ALL PERSONS USING THE HIGHWAY NOR PROTECT HIM FROM THE CONSEQUENCES OF AN ARBITRARY EXERCISE OF THE PRIVILEGE GRANTED ... TO EMERGENCY VEHICLES BY VEHICLE CODE SECTION 21055". (J.A. 159-160)
>
> THE BASIC SPEED LAW OF THE STATE

OF CALIFORNIA AS SET FORTH IN VEHICLE CODE SECTION 22350 SHALL BE OBSERVED AT ALL TIMES: "NO PERSON SHALL DRIVE A VEHICLE UPON A HIGHWAY AT A SPEED GREATER THAN IS REASONABLE OR PRUDENT HAVING DUE REGARD FOR WEATHER, VISIBILITY, THE TRAFFIC ON, AND THE SURFACE AND WIDTH OF THE HIGHWAY, AND IN NO EVENT AT A SPEED WHICH ENDANGERS THE SAFETY OF PERSONS OR PROPERTY." (J.A. 160)

ALTHOUGH VEHICLE CODE SECTION 17004 PROVIDES FOR CIVIL IMMUNITY FROM HARM CAUSED BY AUTHORIZED EMERGENCY VEHICLE OPERATION, IT SHOULD BE EMPHASIZED THAT THIS PROVISION DOES NOT SHIELD A DRIVER OFFICER AGAINST EITHER CIVIL OR POSSIBLY EVEN CRIMINAL LIABILITY FOR UNREASONABLE AND/OR ARBITRARY ACTS RESULTING IN HARM TO OTHERS. (J.A. 161)

These mandates applied to Officer Smith in May of 1990 during his pursuit and completely, and unquestionably declared the unlawfulness of officer Smith's conduct and that he could be held civilly, and even criminally, liable for his pursuit conduct.

Respondents, decedent Lewis' parents, urge this Court to affirm the Ninth Circuit, and deny officer Smith "good faith" qualified immunity since no reasonable officer could think his conduct lawful under the circumstances.

C. Petitioners Themselves Have Conceded That the Law Was Clearly Established at the Time of the Incident.

Petitioners, themselves, *conceded* by their citation to *Britt*, *Daniels*, and *City of Canton* in their Motion for summary Judgement before the District Court, and their Appellee's [sic] Brief to the Ninth Circuit that in May, 1990, the time of the incident, the "reckless disregard", "conscious indifferent" standard for deprivation of constitutional rights under the Fourteenth Amendment during a police pursuit was clearly established. *Britt*, *Daniels*, and *City of Canton* all pre-dated the incident, are cited herein by Respondents, were cited approvingly by petitioners themselves, and make the "contours of the right . . . sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640. As defendants stated:

> Defendants respectfully submit that the approach taken by the District Court in *Britt v. Little Rock Police Department*, 723 F.Supp. 189 (E.D. Ark. 1989), is appropriate for the closely analogous facts of this case. In *Britt*, a police officer struck and killed the plaintiff while in a high-speed pursuit of a car thief. *(Britt v. Little Rock Police Department*, 723 F.Supp. at 190.) Appellee's [sic] Brief of 11/15/93 at 10.

Such an admission by petitioners, together with the actual holding and facts in *Britt*, under the facts herein, in light of officer Smith's objectively reasonable belief and knowledge, go beyond the holding of this Court's recent holding in *Lanier, supra*, that ". . . general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,' *Anderson, supra*, at 640, 107 S.Ct., at 3039. *Id.* at 1227."

CONCLUSION

Based on the foregoing argument and reasoning, respondents respectfully move this Honorable Court to affirm the Ninth Circuit Court of Appeals and hold that the proper standard to be applied in substantive due process police pursuit cases is reckless disregard or deliberate indifference and that officer Smith is not entitled to qualified immunity.

Respectfully submitted,

PAUL J. HEDLUND
MICHAEL L. BAUM
Counsel of Record
BAUM, HEDLUND, ARISTEI,
GUILFORD & DOWNEY
Attorneys for Respondents
12100 Wilshire Boulevard, #950
Los Angeles, California 90025
(310) 207-3233

17

Supreme Court, U.S.
FILED
NOV 5 1997
CLERK

No. 96-1337

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

TERENCE J. CASSIDY*
MARCOS A. KROPF
PORTER, SCOTT, WEIBERG & DELEHANT
350 University Avenue, Suite 200
Sacramento, CA 95825
Telephone: (916) 929-1481

Attorneys for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2388

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

THE APPROPRIATE LEGAL STANDARD TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IN A POLICE PURSUIT IS CONDUCT THAT IS "ARBITRARY" OR "SHOCKS THE CONSCIENCE." 1

NO VIOLATION OF SUBSTANTIVE DUE PROCESS TOOK PLACE IN THIS CASE 10

THE ISSUES IN THIS CASE ARE PROPERLY PRESENTED FOR REVIEW BY THIS COURT 13

DEPUTY SMITH IS ENTITLED TO QUALIFIED IMMUNITY 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 18

Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990) 3

Brower v. County of Inyo, 489 U.S. 593 (1989) 17

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) ..3, 14

Collins v. Harker Heights, Tex., 503 U.S. 115 (1992) 1, 4, 14, 15

Curtis v. Everett, 489 F.2d 516 (3rd Cir. 1973), *cert. denied, sub nom., Smith v. Curtis*, 416 U.S. 995 (1974) 2

Daniels v. Williams, 474 U.S. 327 (1986) 12

Davidson v. Cannon, 474 U.S. 344 (1986) 2

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 1693 (1997), *reh'g denied*, 117 S.Ct. 2533 (1997)..... 16

Fagan v. City of Vineland, 22 F.3d 1296 (3rd Cir. 1994) (en banc) (Cowen, J., dissenting)..... 1

Farmer v. Brennan, 511 U.S. 825 (1994).....3, 4, 9, 17

Hill v. Shobe, 93 F.3d 418 (7th Cir. 1996).....6, 13

Hudson v. McMillan, 503 U.S. 1 (1992)..... 4

Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973), *cert. denied, sub nom., John v. Johnson*, 414 U.S. 1033 (1973) 2, 7, 8

Malley v. Briggs, 475 U.S. 335 (1986)..... 17

TABLE OF AUTHORITIES – Continued

Page

Mays v. City of St. Louis, 123 F.3d 999 (7th Cir. 1997).....6, 7, 10, 18

Medina v. City and County of Denver, 960 F.2d 493 (10th Cir. 1992)..... 3

Oklahoma City v. Tuttle, 471 U.S. 808 (1985)..... 14

Rochin v. California, 342 U.S. 165 (1952).....7, 8

United States v. Lanier, 117 S.Ct. 1219 (1997).....18, 19

Washington v. Glucksberg, 117 S.Ct. 2258 (1997)..... 5

Whitley v. Albers, 475 U.S. 320 (1986)..... 2, 4, 5

OTHER AUTHORITIES CITED

Model Penal Code § 2.02(c)..... 3, 8, 9

Supreme Court Rule 15.2 14

I

THE APPROPRIATE LEGAL STANDARD TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IN A POLICE PURSUIT IS CONDUCT THAT IS "ARBITRARY" OR "SHOCKS THE CONSCIENCE."

In relying on a dissenting opinion in a court of appeals case, respondents assert incorrectly that this court's analysis in *Collins v. Harker Heights, Tex.*, 503 U.S. 115 (1992) in determining whether conduct was sufficiently "arbitrary" or "conscience shocking" so as to give rise to a violation of substantive due process is at best dicta. See Brief for Respondents, 24-25, citing *Fagan v. City of Vineland*, 22 F.3d 1296, 1311-12 (3rd Cir. 1994) (en banc) (Cowen, J., dissenting). In *Collins*, it was necessary for this court to identify the appropriate legal standard to be applied to a claim for an alleged violation of substantive due process in order to determine whether the facts of that particular case were sufficient to meet that standard. *Collins*, at 126-130. Moreover, respondents have failed to cite any opinion rendered by this court which would support the proposition that the legal standard to determine a violation of substantive due process should be either "reckless disregard" or "deliberate indifference." Thus, respondents have failed to establish why the legal standard applied to a claim for an alleged violation of substantive due process by this court in *Collins* should not be the appropriate legal standard to be applied in this case.

Respondents also assert that this court suggested that "deliberate indifference" on the part of a government official would be sufficient to invoke protection under the

Fourteenth Amendment. Brief for Respondents, p. 11. Respondents erroneously rely upon the reference to *Curtis v. Everett*, 489 F.2d 516 (3rd Cir. 1973), *cert. denied, sub nom., Smith v. Curtis*, 416 U.S. 995 (1974) and *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). In that reference, this court was merely comparing a claim for negligence with other conduct that may give rise to a claim for violation of substantive due process. *Id.* The reference does not suggest that deliberate indifference would be sufficient to establish a violation of substantive due process. Rather, both *Curtis v. Everett*, and the other case relied upon by this court for making that comparison, *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973), *cert. denied, sub nom., John v. Johnson*, 414 U.S. 1033 (1973), are cases in which the Third Circuit Court of Appeals applied the "shocks the conscience" test in relation to alleged violations of substantive due process. *Curtis v. Everett*, 489 F.2d at 518-519; *Johnson v. Glick*, 481 F.2d at 1032-1033. Furthermore, this court subsequently adopted the definition of the "shocks the conscience" standard developed by Circuit Judge Friendly as the standard for a claim under the Eighth Amendment involving forceful prison security measures, which was then equated with a claim under the Fourteenth Amendment. *Whitley v. Albers*, 475 U.S. at 320-321, 327 (1986).

Respondents maintain that the decision by the Ninth Circuit Court of Appeals in this case should be affirmed since the legal standard of "reckless disregard" or "deliberate indifference" is sufficient to satisfy any intent requirement necessary to establish a violation of the substantive component of the Fourteenth Amendment. Respondents' position is untenable for several reasons.

First, the definition of "reckless disregard" or "deliberate indifference" is not the issue presented to this court. Compare *Farmer v. Brennan*, 511 U.S. 825 (1994). Specifically, the question presented is whether the Ninth Circuit's decision adopting the "deliberate indifference" standard correctly relied upon *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). In *Canton*, this court held that "deliberate indifference" is sufficient to establish liability against a municipality. *Id.* at 389-390. The legal standard established in *Canton*, however, is objective "deliberate indifference." *Farmer v. Brennan*, 511 U.S. at ___, 114 S.Ct. at 1981. In their Brief, respondents take the position that a reckless intent standard would satisfy any intent requirement of the Fourteenth Amendment. Respondents have failed to distinguish, however, between objective and subjective recklessness as the test for "deliberate indifference." *Id.* Instead, respondents have merely asserted that the test for "deliberate indifference" should be subjective or criminal recklessness. See Brief for Respondents, pp. 12-14 and fn. 7 and 8, relying upon, inter alia, *Medina v. City and County of Denver*, 960 F.2d 493, 496 (10th Cir. 1992), *Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990) and Model Penal Code § 2.02(c). In relying upon subjective recklessness to support "deliberate indifference," respondents have essentially conceded that the Ninth Circuit's reliance upon the objective "deliberate indifference" standard set forth in *Canton v. Harris*, is incorrect. Thus, while respondents are requesting that the Ninth Circuit Court of Appeal decision in this case be affirmed, they are doing so by requesting a reckless intent standard with a "heightened degree of mental culpability" that was not adopted by the Court of Appeal in

the *Lewis* decision. Brief for Respondents, p. 16. Therefore, respondents have implicitly conceded that the decision by the Ninth Circuit Court of Appeal should be reversed in this case because it did not apply the appropriate legal standard, as defined by respondents, to a claim for an alleged violation of substantive due process.

Second, assuming respondents have now conceded that the minimum conduct necessary to establish a violation of substantive due process is subjective or criminal recklessness, then the issue before this court is whether claims for alleged violations of substantive due process involving police pursuits should be governed by that standard, which this court has adopted with respect to claims involving conditions of confinement under the Eighth Amendment, *Farmer v. Brennan, supra,* or the legal standard of "arbitrary" or "shocks the conscience" as set forth in *Collins*. As indicated above, this court has equated the "shocks the conscience" standard under the Fourteenth Amendment with conduct that is "malicious and sadistic for the very purpose of causing harm" in connection with forceful prison security measures in a claim under the Eighth Amendment. *Whitley v. Albers, supra; Hudson v. McMillan,* 503 U.S. 1 (1992) (allegations of excessive force by prison officials also governed by malicious and sadistic standard). Thus, by analogy to claims under the Eighth Amendment, the issue is whether the governmental interests at stake in a police pursuit case more closely resemble the use of force by prison officials or conditions of confinement.

Respondents have failed to establish why the governmental interests at stake in a police pursuit are not more closely akin to the use of force by prison officials than the

interests involving conditions of confinement. As a practical matter, police pursuits may have even more compelling reasons for application of a more stringent standard than the interests at stake with respect to use of force in a prison. Decisions made by peace officers in the field regarding the initiation and determination of whether to continue a pursuit are made in dynamic circumstances under intense pressure. Peace officers involved in pursuits of fleeing suspects must, under rapidly evolving circumstances, consider whether the seriousness of the offense warrants a chase at speeds in excess of the posted limit, whether there are any alternative means of apprehending that suspect, whether the pursuit presents unreasonable hazards to other persons or property, which necessarily involve assessments of other vehicle traffic, pedestrian traffic, location of the pursuit, road conditions, weather conditions, visibility or other possible known or unknown road hazards. These factors are even more demanding on an officer where the fleeing suspect has virtually unfettered control over the speed, duration and location of the pursuit. Similar to the forceful prison security measures analyzed in *Whitley*, this court should be hesitant to second guess decisions made by peace officers engaged in police pursuits. Law enforcement agencies also need sufficient latitude to develop appropriate policies and procedures for a given locale to assure an appropriate balance between effective apprehension of suspects and safety of the community. To adopt the less stringent standard of subjective recklessness would effectively remove governing of police pursuits "outside the arena of public debate and legislative action." *Washington v. Glucksberg,* 117 S.Ct. 2258, 2267-2268 (1997).

By comparison, situations involving conditions of confinement are arguably undertaken with a much greater opportunity for reflection on the part of the official who has a duty to provide humane conditions and safety for inmates. In addition, the responsibility to provide proper conditions of confinement does not conflict with the type of competing administrative concerns involved in police pursuits, such as the apprehension of fleeing criminals and the potential that if constitutional restraints are placed on pursuits, it may encourage fleeing suspects to go faster and increase the level of risk so as to avoid capture by an officer who is forced to discontinue the pursuit.

The policy reasons why this court should adopt the more stringent standard of the "arbitrary" or "shocks the conscience" were recently reiterated by Circuit Judge Easterbrook in *Mays v. City of St. Louis*, 123 F.3d 999 (7th Cir. 1997).[1] In *Mays*, the Seventh Circuit acknowledged the difficulties faced by peace officers engaged in pursuits in relation to the potential risk as follows: "Political society must consider not only the risks to passengers, pedestrians, and other drivers that high speed chases

---

[1] In *Mays*, the Seventh Circuit expressly rejected expanding claims for alleged violations of substantive due process under the Fourteenth Amendment to cases involving police pursuits that do not otherwise fall within the framework of the Fourth Amendment. But see, *Hill v. Shobe*, 93 F.3d 418 (7th Cir. 1996). Thus, contrary to the position taken by respondents in footnote 11 at page 22 of the Brief for Respondents, there is case law which specifically holds that regardless of the level of culpability, a government official's alleged deprivation of life or liberty in the context of a police pursuit does not implicate the Fourteenth Amendment.

engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee – and successful flights not only reduce the number of crimes solved, but also create their own risks for passengers and bystanders." *Mays*, 123 F.3d at ___, 1997 U.S. App. LEXIS 22826, at *12. Thus, it is quite clear that the governmental interests at stake in police pursuits more closely resemble the governmental interests in the use of force by prison officials. Therefore, reversal of the decision by the Ninth Circuit is necessary and proper to recognize the governmental interests in police pursuits by applying the "arbitrary" or "shocks the conscience" standard to police pursuit cases.

Respondents contend that a "shocks the conscience" standard is ambiguous and unworkable. The issue regarding the definition of the legal standard of "arbitrary" or "shocks the conscience" has not been presented for review. To the extent the question of whether that legal standard should be applied to a claim involving violation of the Fourteenth Amendment in a police pursuit case necessarily calls the definition of that standard into question, it most certainly has both utility and continued vitality. In determining whether conduct "shocks the conscience," this court has used a definition including conduct which is brutal and offensive to human dignity. *Rochin v. California*, 342 U.S. 165, 174 (1952). Perhaps the day has come to formally adopt the definition expressed by Judge Friendly in *Johnson v. Glick, supra*. Requiring conduct that is malicious and sadistic for the very purpose of causing harm would clearly satisfy the need for

deprivations of life, liberty or property under the Fourteenth Amendment to be deliberate and intentional. Nevertheless, the legal standard of "arbitrary" or "shocks the conscience" has been a workable standard since *Rochin v. California*, and is readily demonstrated by the ability of the recent decisions by the Courts of Appeal in applying that standard to police pursuit cases. See Petitioners' Brief on the Merits, pp. 17-20, 30-31.

Respondents also argue that legal standard of "reckless disregard" or "deliberate indifference" would sufficiently limit the scope of cognizable due process violations. Petitioners submit that using subjective recklessness as the test for "deliberate indifference" will substantially increase litigation involving claims for violation of substantive due process in police pursuit cases. This is once again due to the fact that police pursuits inherently involve substantial risks to officers, innocent bystanders and the suspects. In practice, creative pleading will almost always give rise to a question of fact as to whether the facts and circumstances known to the officer during the course of the pursuit were sufficient to find him subjectively reckless in that he should have terminated the pursuit because of a substantial risk of harm to a bystander or the suspect.

The comment to Model Penal Code § 2.02(2)(c) which defines criminal recklessness illustrates this point. In that regard, the comment states as follows:

> "Describing the risk as "substantial" and "unjustifiable" is useful but not sufficient, for these are terms of degree, and the acceptability of a risk in a given case depends on a great many variables. Some standard is needed for determining how substantial and how unjustifiable the risk must be in order to warrant a finding of culpability. *There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned*. The code proposes, therefore, that this difficulty be accepted frankly, and that the jury be asked to measure the substantiality and unjustifiability of the risk by asking whether its disregard, given the actor's perceptions, involved a gross deviation from the standard of conduct that a law-abiding person in the actor's situation would observe." American Law Institute, Model Penal Code § 2.02, Comment, p. 237 (emphasis added).

Thus, while subjective or criminal recklessness clearly involves a heightened level of mental culpability, whether a peace officer's conduct in a police pursuit is sufficient to constitute criminal recklessness will oftentimes be a question of fact for the jury. *Farmer v. Brennan*, 511 U.S. at ___, 114 S.Ct. at 1989. As a result, in any police pursuit that involves some injury or death, save and except those incidents such as the case at bar that may involve conduct that is at best purely negligent, a jury will be called upon to decide whether the risks outweighed the benefits to determine if there was a gross deviation from a standard of conduct. In actuality, such a standard will call upon a jury to evaluate the reasonableness of an actor's conduct and is therefore merely an extension of negligence. In contrast, the legal standard of "arbitrary" or "shocks the conscience" will allow courts to exercise control over the nature of the claims which may be asserted under the Fourteenth Amendment in the context of police pursuits.

Therefore, based on the manner in which the criminal or subjective reckless standard is to be applied, it seems quite clear that claims for violations of substantive due process arising out of police pursuits will be used to supplant traditional tort laws.

There is one additional policy consideration which, when taken into account, favors application of the "arbitrary" or "shocks the conscience" standard in police pursuit cases. The suspect chooses to flee and it is the suspect who, by reckless driving, creates the danger to society. It is fundamentally unfair and unacceptable to attempt to shift the blame for a suspect's reckless and criminal conduct to a peace officer attempting to perform his sworn duty to apprehend criminals. See *Mays, supra,* at *14-*15. Thus, to adopt a legal standard less stringent than "arbitrary" or "shocks the conscience" would promote the proposition that it is the peace officer who caused the suspect to flee and who creates the danger by continuing the pursuit.

II

NO VIOLATION OF SUBSTANTIVE DUE PROCESS TOOK PLACE IN THIS CASE

Petitioners have requested that once this court determines that the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment in police pursuit cases is "arbitrary" or "shocks the conscience," then this court should also find that no constitutional violation occurred in this case. Respondents have failed to contest that such a finding would be appropriate. Nevertheless, petitioners

respectfully submit that additional clarification of the factual background of this case may assist the court in making that determination. In particular, it is undisputed that Deputy Smith observed Deputy Stapp attempt to stop the motorcycle by turning on the overhead lights of his patrol unit and pulling the patrol car out into the street in an attempt to block the path of the motorcycle. Respondents' expert witness, D.P. Van Blaricom, admits that based on that information, Deputy Smith had the right to stop the motorcycle for failure to yield when requested by another patrol unit to do so. See J.A. at 175-176, 275; Deposition of D.B. Van Blaricom, 60:13-20; California Vehicle Code § 2800.1(a) (which prohibits a suspect from fleeing or eluding a marked patrol unit exhibiting one lighted red lamp and the person sees or reasonably should have seen the lamp). Deputy Smith pursued the motorcycle with red lights and siren and Mr. Willard was aware that he was being pursued by a marked patrol unit with red lights and siren. See Deposition of Willard, 33:3-12; 38:11-16. Deputy Smith did not know the ages or the identities of Mr. Lewis or Mr. Willard. The pursuit took place on rural two lane roads with no curbs or sidewalks with some residences. See Deposition of Smith at 35:16-25; Deposition of Stephenson, 12:1-19; 17:2-8. As Deputy Smith continued the pursuit southbound on Chestnut Avenue prior to or as he approached a crest in the roadway, he did not lose sight of the motorcyclists, but there was a point where he could not see the motorcycle from the seat down. See Deposition of Smith at 50:16-20; 51:4-19; 52:14-28; 53:5-13. This crest or hill in the roadway was not a blind hill over which the officer could not see, but was a small rise in the

road where Deputy Smith momentarily lost sight of the motorcycle but not its occupants. As the motorcycle passed over the crest in the road, it rapidly decelerated in order to make a sharp left turn. Officer Smith, who was approximately three hundred feed behind the motorcycle, observed smoke coming from the rear wheel, immediately applied his brakes but accidentally skidded approximately one hundred-sixty-six feet colliding with the motorcycle and/or Mr. Lewis.

Respondents submit that *Daniels v. Williams*, 474 U.S. 327 (1986) suggests that intentional conduct which interferes with a person's life or liberty constitutes a constitutional violation. Brief for Respondents, pp. 4, 22. Assuming that this court adopts that requirement, then nothing less than intentional conduct would constitute a deprivation of substantive due process. Since respondents have conceded that Deputy Smith did not intentionally hit Lewis or the motorcycle, P.A. 10, then respondents by their own admission are precluded from asserting a claim against Deputy Smith for violation of the Fourteenth Amendment in this case.

Respondents have also failed to establish that in the event this court applies the "arbitrary" or "shocks the conscience" standard in this case, that the conduct of Deputy Smith was sufficiently egregious to raise a question of fact under that standard. Deputy Smith did not act maliciously or sadistically for the very purpose of causing harm to Mr. Lewis, nor did he engage in the pursuit knowing and willing that harm would occur. Rather, this case involves an automobile-motorcycle accident in which the motorcyclist abruptly slowed down or stopped in attempting to negotiate a left turn to make good his

escape and in spite of immediately applying his brakes, Deputy Smith's patrol unit skidded approximately one hundred-sixty-six feet and then collided with Mr. Lewis. Moreover, even assuming arguendo this court were to accept respondents' position that a subjectively reckless definition of deliberate indifference is the appropriate legal standard to be applied to a claim for a violation of substantive due process in a police pursuit case, respondents have failed to establish that there is sufficient evidence to support such a claim in this case. While Deputy Smith's conduct may arguably fall within the classification of negligence, respondents have failed to demonstrate that Deputy Smith had actual knowledge of impending harm but consciously refused to prevent it. See *Hill v. Shobe*, 93 F.3d 421 (7th Cir. 1996). The mere fact that an official may have failed to alleviate a significant risk that he did not perceive is not sufficient to meet that standard. Rather, respondents would be required to show that Deputy Smith was willing to let a fatal collision occur which the record demonstrates did not occur. *Id.*

For each of those reasons, petitioners respectfully submit that this court find that no constitutional violation occurred in this case.

III

THE ISSUES IN THIS CASE ARE PROPERLY PRESENTED FOR REVIEW BY THIS COURT

Respondents argue that petitioners should be estopped from asserting that anything more than reckless conduct is necessary to establish a violation of the Fourteenth Amendment. Essentially, respondents contend that

petitioners failed to assert that the applicable legal standard to establish a violation of the Fourteenth Amendment in this police pursuit case should be "shocks the conscience" before the lower courts. First, such an alleged defect does not affect the jurisdiction of this court. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 383-384 (1989). Second, this court has specifically addressed this issue as follows: "Non- jurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for writ of certiorari; if not, we consider it within our discretion to deem this defect waived." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 384 (1989) citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); and see Supreme Court Rule 15.2.

The Petition for Certiorari in this case set forth three "Questions Presented." Respondents' present objection is directed to the first question presented.[2] The first question presented both petitioners' request that the appropriate legal standard to establish a violation of substantive due process under the Fourteenth Amendment be "shocks the conscience" and specifically cited *Collins v. City of Harker Heights, Tex.* for that proposition. If respondents sought to raise some form of non-jurisdictional

---

[2] The Petition for Writ of Certiorari in this case was granted.

Therefore, all "Questions Presented" are subject to review by this court. Because respondents' objection is only raised with respect to the first question presented for review in the Petition for Writ of Certiorari, petitioners respectfully submit that the second and third "Questions Presented" are properly presented for review without any objection in either Respondents' Brief in Opposition or Brief for Respondents.

defect with the assertion of that issue, they certainly could and should have raised that issue in Respondents' Brief in Opposition so that it could be fully addressed at that time. Respondents failed to raise that objection, or even hint at any such deficiency, however, in their Brief in Opposition to the Petition for Writ of Certiorari. See Respondents' Brief in Opposition. Therefore, respondents failed to raise that objection in a timely manner. On that basis, petitioners respectfully submit that granting certiorari review in this case was proper and any alleged defect should be deemed waived.

Petitioners also respectfully submit that they have steadfastly contested liability in this case. Contrary to the assertion by respondents, petitioners asserted the legal standard of "arbitrary" or "shocks the conscience" in their original Motion for Summary Judgment filed with the District Court. J.A. 38-42. Although petitioners did not cite the *Collins* case in Appellees' Brief in the Ninth Circuit Court of Appeals, the Ninth Circuit was clearly aware of *Collins*, cited *Collins* in its decision in this case, but chose to disregard it. In Appellees' Petition for Rehearing and Suggestions for Rehearing en banc, however, petitioners expressly raised the conflict between the holding by the Ninth Circuit in this case and *Collins*. Petitioners'/appellees' Petition for Rehearing specifically requested further review based on the need to reconcile the deliberate indifference standard adopted by the Ninth Circuit with *Collins* so as to provide a rule of national application and uniformity. See Appellees' Petition for Rehearing and Suggestion for Rehearing en banc at 5-6. Thus, the Ninth Circuit had the opportunity to address *Collins* in context of its limitation on *Canton v. Harris*, and

the applicable legal standard to a claim for violation of due process but declined to do so. Therefore, petitioners sought review of the decision in this case by this court.

Following submission of appellees' Petition for Rehearing and Suggestion for Rehearing en banc, the First Circuit Court of Appeals issued its decision in *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 1693 (1997), *reh'g denied*, 117 S.Ct. 2533 (1997). The impact of the *Evans* decision on petitioners was twofold. First, the decision in *Evans* brought to the forefront the conflict between the Circuit Courts of Appeal regarding the appropriate legal standard to be applied in a police pursuit case for a claim under the Fourteenth Amendment. Second, the First Circuit specifically criticized the decision in *Lewis* for failing to properly analyze the policy considerations of why the "reckless disregard" and "deliberate indifference" standard(s) do not provide an appropriate balance between effective law enforcement and deprivation of the right to substantive due process.

The questions presented which have resulted in plenary review by this court involve far reaching social, political and judicial implications with respect to police pursuits. The scarce judicial resources of this court are well served by resolving the conflicting decisions of the Courts of Appeal and establishing a uniform rule regarding claims for alleged violations of substantive due process in police pursuit cases. Therefore, petitioners respectfully request that this court proceed to rule on the merits of the questions presented.

IV

DEPUTY SMITH IS ENTITLED TO QUALIFIED IMMUNITY

The qualified immunity defense is meant to protect all officers but "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity is governed by an objective standard, but if reasonably competent officers could disagree on the issue, then the immunity should apply. *Id.*

In support of respondents' position that the Ninth Circuit's decision denying qualified immunity to Deputy Smith should be affirmed, respondents have merely restated the reasoning of the Ninth Circuit in arriving at that holding. Brief for Respondents, pp. 27-35. Respondents fail to demonstrate how those various legal standards would have provided a reasonable officer in the field with settled guidelines of what conduct and/or state of mind would be sufficiently culpable to render him liable for a violation of substantive due process. Although an officer would surely have recognized that the intentional use of a patrol unit to stop a suspect vehicle could potentially be actionable, *Brower v. County of Inyo*, 489 U.S. 593 (1989), a legal standard of "sufficiently egregious" does not provide the type of bright line so that a reasonable official could anticipate when their conduct would violate substantive due process. The difficulty faced by officers in the field in attempting to predict what legal standard may give rise to liability under the Fourteenth Amendment is demonstrated by the need for this court in *Farmer v. Brennan* to clarify the definition of "deliberate indifference" approximately four (4) years after the pursuit in this case in May, 1990. Nevertheless, respondents now

seek to hold Deputy Smith liable under a standard of criminal recklessness which was just one of the myriad of legal standards in conflict in May, 1990, and remain in conflict in this very case. Thus, it cannot be said that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" in this case. *United States v. Lanier*, 117 S.Ct. 1219, 1227 (1997) citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The recent case of *Mays v. City of East St. Louis, supra*, further illustrates this point. While this case presents the issue of what legal standard should be applied to an alleged violation of substantive due process in a police pursuit case, the Seventh Circuit has determined that an officer involved in a pursuit does not have a duty to prevent injury to passengers by letting criminals escape. *Mays, supra*. at *11. Thus, there not only remains a conflict in the decisional law regarding the appropriate legal standard to be applied, but also the issue of whether there exists a constitutional right in the first instance. If, in fact, qualified immunity is truly designed and meant to protect government officials who are either plainly incompetent or knowingly violate the law, then certainly the absence of the clear constitutional rule, or perhaps the lack of implicating the substantive component of the Due Process Clause in the first instance should shield Deputy Smith from liability in this case. Moreover, reasonably competent officers could obviously disagree on this issue. Therefore, Deputy Smith is entitled to the application of qualified immunity with respect to his involvement in the police pursuit in this case in May, 1990.

Respondents also assert that Deputy Smith is not entitled to qualified immunity because a reasonable officer in his position could not reasonably believe that the conduct involved in the pursuit in this case was lawful. Respondents then attempt to illuminate favorable facts to support their claim. Brief for Respondents, pp. 38-39. Respondents have failed, however, to establish why those facts are demonstrably different from facts and arguments raised in the case law which existed in May, 1990, and had found that officers were not liable. Where, as here, earlier case law has left open the issue of what general rule applies to a particular type of conduct, "a very high degree of prior factual particularity may be necessary." *United States v. Lanier*, 117 S.Ct. 1227 (1997). Based on the facts presented in the record in this case, petitioners respectfully submit reasonably competent officers could disagree whether the undisputed material conduct on the part of Deputy Smith was conduct that violated a clearly established constitutional right as defined by the decisional law available in May, 1990.

Respondents also contend that petitioners conceded that the law was clearly established at the time of the subject incident. Petitioners have asserted the issue of qualified immunity since the outset of this case. Qualified immunity was asserted as an affirmative defense in the Answer to the Complaint and was clearly articulated in the Motion for Summary Judgment brought before the District Court. J.A. at 51. Specifically, petitioners asserted that there was no clearly established constitutional right to be free from police pursuit, that Deputy Smith did not act arbitrarily or brutal so as to shock the conscience and a reasonable officer in his position could have believed

that the police pursuit was lawful in this case. J.A. at 51-52. Here, and as more fully set forth above, respondents have failed to include all of the arguments proffered by petitioners in support of summary judgment and on appeal in this case. Moreover, respondents specifically contested the issue of whether the law regarding violations of substantive due process was clearly established. Appellees' Brief, pp. 13-18. Thus, petitioners have never conceded that the law was clearly established. Rather, petitioners respectfully submit that for all of the reasons set forth in petitioners' Brief on the Merits and as set forth above, Deputy Smith is entitled to qualified immunity for his actions in connection with the police pursuit in this case.

V

CONCLUSION

Based on the foregoing, and for all of the reasons set forth in petitioners' Brief on the Merits, petitioners County of Sacramento, Sacramento County Sheriff's Department and Deputy Smith respectfully request that this court reverse the judgment of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

TERENCE J. CASSIDY*
MARCOS A. KROPF
PORTER, SCOTT, WEIBERG & DELEHANT
350 University Avenue, Suite 200
Sacramento, CA 95825
Telephone: (916) 929-1481

Attorneys for Petitioner

**Counsel of Record*

Supreme Court, U.S.
FILED
AUG 6 1997
CLERK

No. 96-1337 (8)

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

v. *Petitioners,*

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON THE MERITS OF AMICI CURIAE COUNTY OF RIVERSIDE, CITY OF LOS ANGELES, COUNTY OF SAN DIEGO, COUNTY OF KERN, COUNTY OF MENDOCINO, COUNTY OF PLUMAS, COUNTY OF SAN BERNARDINO, COUNTY OF SAN LUIS OBISPO, COUNTY OF SANTA CLARA, COUNTY OF SISKIYOU, COUNTY OF SONOMA, AND COUNTY OF TEHAMA IN SUPPORT OF PETITIONERS

JOHN J. SANSONE
County Counsel
County of San Diego
DIANE BARDSLEY
Chief Deputy
1600 Pacific Highway
Room 355
San Diego, CA 92101
(619) 531-4847

WILLIAM C. KATZENSTEIN
County Counsel
Office of County Counsel
County of Riverside
3535 10th Street,
Suite 300
Riverside, CA 92504
(909) 275-6300

JAMES K. HAHN
City Attorney
G. DANIEL WOODARD
Senior Assistant City Attorney
GREGORY P. ORLAND*
Deputy City Attorney
City of Los Angeles
200 North Main Street
18th Floor
Los Angeles, CA 90012-4131
(213) 485-5452

GREINES, MARTIN, STEIN & RICHLAND LLP
TIMOTHY T. COATES
9601 Wilshire Boulevard,
Suite 544
Beverly Hills, CA 90210
(310) 859-7811

*Counsel of Record

Attorneys for Amici Curiae

(Additional Amici Curiae Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

37 pp

Additional Amici Curiae

BERNARD C. BARMAN, SR.
County Counsel
County of Kern
1115 Truxtun Avenue,
Fourth Floor
Bakersfield, California
93301
(805) 861-2326

H. PETER KLEIN
County Counsel
County of Mendocino
JEANINE BENNETT NADEL
Deputy County Counsel
501 Low Cap Road,
Room 1030
Ukiah, California 95482
(707) 463-4446

ROBERT SHULMAN
County Counsel
County of Plumas
520 Main Street
Post Office Box 10388
Quincy, California
95971-6010
(916) 283-6240

ALAN K. MARKS
County Counsel
County of San Bernardino
MICHAEL A. SACHS
Chief Deputy County
Counsel
385 North Arrowhead
Avenue
San Bernardino,
California 92415-0140
(909) 387-5455

JAMES B. LINDHOLM, JR.
County Counsel
County of San Luis
Obispo
JAC A. CRAWFORD
Assistant County Counsel
County Government
Center
1035 Palm Street,
Room 386
San Luis Obispo,
California 93408
(805) 781-5400

STEVEN M. WOODSIDE
County Counsel
County of Santa Clara
JAMES RUMBLE
Chief Deputy
70 West Hedding Street,
9th Floor
San Jose, California
95110-1770
(408) 299-2111

FRANK J. DEMARCO
County Counsel
County of Siskiyou
304 Lane Street
Post Office Box 659
Yreka, California 96097
(916) 842-8100

JAMES P. BOTZ
County Counsel
County of Sonoma
575 Administration Drive,
Room 116A
Santa Rosa, California
95403-2881
(707) 527-2421

NELSON D. BUCK
County Counsel
County of Tehama
633 Washington
Post Office Box 8189
Red Bluff, California
96080
(916) 527-9252

TABLE OF CONTENTS

Page

BRIEF OF AMICI CURIAE..... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 6

I. THE COURT SHOULD ADDRESS THE THRESHOLD ISSUE OF WHETHER THE LIABILITY OF POLICE OFFICERS STEMMING FROM POLICE PURSUITS FALLS WITHIN THE AMORPHOUS PROVISIONS OF THE FOURTEENTH AMENDMENT, OR WHETHER CONSTITUTIONAL CLAIMS ARE CONFINED TO THE EXPLICIT TEXTUAL LIMITATIONS OF THE FOURTH AMENDMENT..... 6

II. ANY RULE GOVERNING CONSTITUTIONAL LIABILITY ARISING FROM POLICE PURSUITS MUST REFLECT THE RELATIVELY LOW INCIDENCE OF SERIOUS INJURIES OR DEATHS RESULTING FROM PURSUITS AND THE SIGNIFICANT ROLE PURSUITS PLAY IN APPREHENDING THOSE WHO COMMIT THE MOST SERIOUS CRIMES..... 19

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994)..... *passim*

Berman v. City of Daly City, 21 Cal. App. 4th 276, 26 Cal. Rptr. 2d 493 (1993) 17

Billester v. City of Corona, 26 Cal. App. 4th 1107, 32 Cal. Rptr. 2d 121 (1994) 17

Brower v. County of Inyo, 489 U.S. 593 (1989) 3, 4, 6, 11

Brumer v. City of Los Angeles, 24 Cal. App. 4th 983, 29 Cal. Rptr. 2d 515 (1994) 17

California v. Hodari, 499 U.S. 621 (1991)....4, 11, 12, 14, 16

Colvin v. City of Gardena, 11 Cal. App. 4th 1270, 15 Cal. Rptr. 2d 234 (1992) 17

Deshaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 15, 16

Dismukes v. Hackathorn, 802 F. Supp. 1442 (1992)..... 9

Estate of Story v. McDuffie County, 929 F. Supp. 1523 (1996), aff'd in an unpublished opinion, 110 F.3d 798 (11th Cir. 1997)..... 9

Graham v. Connor, 490 U.S. 386 (1989) 3, 6, 7, 8, 9

Hester v. United States, 265 U.S. 57 (1924)..... 15

Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1996), cert. granted, 138 L.Ed.2d 173 (1997)..... 13, 18, 24

Montgomery v. County of Clinton, 743 F. Supp. 1253 (1990), aff'd in an unpublished opinion, 940 F.2d 661 (6th Cir. 1991)..... 9

TABLE OF AUTHORITIES – Continued

Page

Paul v. Davis, 424 U.S. 693 (1976), reh'g denied, 425 U.S. 985 (1976) 10

Payne v. City of Perris, 12 Cal. App. 4th 1738, 16 Cal. Rptr. 2d 143 (1993) 17

Rochin v. California, 342 U.S. 165 (1952)..... 14

STATUTES

California Vehicle Code section 17004 17

RULES

Supreme Court Rule 37.4 1

OTHER AUTHORITIES

INSURANCE INFORMATION INSTITUTE, THE FACT BOOK 1997 (1997)..... 23

Letitia E. Landry, Critics Sound Alarm Over Police Chases, The Sacramento Bee, July 6, 1995, at A12 22

Lightning . . . Natures Fireworks, National Weather Service, National Oceanic and Atmospheric Administration (1997)..... 21

Not Just Isolated Incidents, The Epidemic of Police Pursuits in Southern California (1996) 19, 20, 22, 24, 25, 27

TABLE OF AUTHORITIES – Continued

Page

Preliminary Pursuit Updates (1993, 1994, 1995)..... 22, 25, 27

The Evaluation of Risk, Initial Cause vs. Final Outcome in Police Pursuits, Business Transportation and Housing Agency Department of California Highway Patrol (Aug. 1995)..... 20, 22, 23, 24

Department Traffic Coordination Section, Traffic Analysis Unit (1993)..... 22, 27

BRIEF OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.4, by and through their authorized law officers, the County of Riverside, the City of Los Angeles, the County of San Diego, the County of Kern, the County of Mendocino, the County of Plumas, the County of San Bernardino, the County of San Luis Obispo, the County of Santa Clara, the County of Siskiyou, the County of Sonoma, and the County of Tehama, political subdivisions of the State of California, hereby submit the following brief in support of petitioners County of Sacramento, Sacramento County Sheriff's Department and James Everett Smith in the above case. Amici are public entities in the State of California, with a collective population of over 4 million residents. The decision of the Ninth Circuit Court of Appeals in this case holding that the conduct of police officers in initiating, conducting and terminating a vehicular pursuit is governed by the Due Process Clause of the Fourteenth Amendment, evaluated under a "deliberate indifference" or "reckless disregard" standard and is not subject to qualified immunity has a direct and substantial effect on these amici, whose law enforcement personnel must, by necessity, engage in vehicular pursuits on a regular basis.

In addition, the general principles of law addressed in the Ninth Circuit's opinion and presented for review to

this Court concerning the existence and nature of any constitutional claim arising from a police pursuit are of a substantial and continuing concern to these public entities, as well as public entities throughout the country.

SUMMARY OF ARGUMENT

1. This case presents an important threshold issue as yet unaddressed by the parties or the lower courts – whether the Fourteenth Amendment governs police pursuit claims that do not result in a Fourth Amendment seizure. As the decision of the Ninth Circuit in this case and those of the other circuit courts reveal, federal courts have routinely analyzed and permitted such claims under the guise of the "substantive due process" prong of the Fourteenth Amendment. Yet, a threshold question exists as to whether such claims are cognizable under the Fourteenth Amendment or any other provision of the Constitution. In *Albright v. Oliver*, 510 U.S. 266 (1994), the plaintiff, consistent with existing authority, asserted a malicious prosecution claim premised upon violation of the Due Process Clause of the Fourteenth Amendment. A plurality of this Court concluded however, that to the extent a malicious prosecution claim existed under the Constitution, it would fall within the confines of the Fourth Amendment. A similar blanket assumption has been made by the plaintiffs here, as well as the Ninth Circuit and other federal circuits, as to the applicability of the Fourteenth Amendment to police pursuits that fall short of seizure, but nonetheless result in injury to a suspect.

In *Graham v. Connor*, 490 U.S. 386, 395 (1989), this Court held that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . rather than under a 'substantive due process' approach." In *Albright*, a plurality of the Court reaffirmed this rule, holding that "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process" must be the guide for analyzing these claims.' " *Albright*, 510 U.S. at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1986)). As the Court recognized in *Brower v. County of Inyo*, 489 U.S. 593 (1989), a police pursuit may result in liability under the Constitution within the parameters of the Fourth Amendment, where the suspect is seized, i.e., injured, as a result of intentional application of force by a police officer, such as creating a roadblock or running a suspect off the road. Amici submit that, consistent with *Graham*, *Albright* and *Brower*, the full measure of constitutional protection afforded to suspects who are pursued by police is governed by the Fourth Amendment – limiting liability to those situations where police officers intentionally take action to terminate the pursuit.

Applying an amorphous due process standard to pursuit claims that fall short of a seizure would not afford any greater protection than the Fourth Amendment. Conduct by police officers during a pursuit that would be sufficiently egregious and likely to produce injury to a suspect that it would constitute "deliberate indifference"

or "shock the conscience" under the Due Process Clause would, in most circumstances, create a jury question under *Brower* as to whether law enforcement officers intended to "seize" the suspect under the Fourth Amendment. Similarly, imposition of a due process standard would not be more likely to deter baseless pursuits by police officers than application of a Fourth Amendment standard. As the Court observed in *California v. Hodari*, 499 U.S. 621 (1991), in rejecting a similar claim, police officers do not initiate pursuits in the belief that a suspect will flee, much less do so in a dangerous manner. The remedy for an unlawfully initiated pursuit is simply to yield to the officer and then file suit premised upon the unlawful detention under the Fourth Amendment. Individuals do not, however, have a constitutional right to unilaterally determine the validity of a police officer's command to stop or to employ "self-help" by fleeing in a hazardous manner.

Police conduct in the context of vehicular pursuits that does not result in a seizure should not be actionable under some amorphous substantive due process standard, but instead be governed solely by state tort law. California has established strict criteria for the conduct of police pursuits, as well as liability rules designed to strike a balance between the clear need of law enforcement personnel to initiate and conduct pursuits, as well as the need to protect public safety. By essentially creating a constitutional cause of action premised upon conduct that is more properly subject to state tort law, the federal courts in general, and the Ninth Circuit specifically, have created an incentive to pursue such claims in the already overburdened federal courts.

2. Any rule governing constitutional liability arising from police pursuits, whether it be under the Due Process Clause, the Fourth Amendment or some other theory, must be framed in light of the risk (or relative lack thereof) of serious injuries caused by pursuits, as well as the significant role pursuits play in allowing law enforcement to apprehend those who commit the most serious crimes. Review of the hard statistical data reveals that an individual is far less likely to be killed or seriously injured in a police pursuit than by a drunk driver or in some other automobile accident. Indeed, the odds are greater that an individual would be struck by lightning than injured in a police pursuit. Moreover, research confirms what should be obvious – those who flee police are most likely to have committed serious crimes. In California, although 52% of pursuits began with a minor traffic infraction, 73% of those arrested were subsequently charged with felonies, and of that number, two-thirds were charged with a felony other than evading police. Thus, although a bare majority of pursuits may start as a traffic infraction, the overwhelming majority result in felony charges. In sum, as a general matter, the risks posed by police pursuits are strongly outweighed by their integral role in allowing police to apprehend the most serious offenders.

ARGUMENT

I.

THE COURT SHOULD ADDRESS THE THRESHOLD ISSUE OF WHETHER THE LIABILITY OF POLICE OFFICERS STEMMING FROM POLICE PURSUITS FALLS WITHIN THE AMORPHOUS PROVISIONS OF THE FOURTEENTH AMENDMENT, OR WHETHER CONSTITUTIONAL CLAIMS ARE CONFINED TO THE EXPLICIT TEXTUAL LIMITATIONS OF THE FOURTH AMENDMENT.

As previously noted, in *Albright v. Oliver*, 510 U.S. 266, the plaintiff had asserted a malicious prosecution claim premised upon violation of the Fourteenth Amendment. At the time, the circuit courts recognizing a malicious prosecution claim generally did so in the context of the Due Process Clause. *See Albright*, 510 U.S. at 270 n.4. Although the issue was not raised by the lower courts or the parties, a plurality of this Court concluded that to the extent the Constitution might give rise to some sort of claim for malicious prosecution, a plaintiff's rights rested within the more specific provisions of the Fourth Amendment, and not the Fourteenth Amendment.

Amici curiae submit that the lower federal courts are jumping to a similar conclusion with respect to liability for injuries arising from police pursuits that do not result in a seizure under *Brower v. County of Inyo*, 489 U.S. 593 (1989). While virtually all published decisions assume the existence of a substantive due process claim, amici submit that this Court's decisions in *Graham*, *Albright* and *Brower* make it clear that the full extent of liability to be imposed for police pursuits is defined by the Fourth Amendment, and that police conduct falling outside

those standards is squarely within the province of state tort law.

In *Graham* the Court expressed an intent to halt the use of amorphous substantive due process standards as a means of creating constitutional rights which were not fairly traceable to the Fourth Amendment. 490 U.S. at 393-95. The Court held that "*all* claims that law enforcement officers have used *excessive force* – deadly or not – in the *course* of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . rather than under a 'substantive due process' approach." 490 U.S. at 395 (second and third emphasis added). In a concurring opinion Justices Blackmun, Brennan, and Marshall recognized the breadth of the holding, and refused to "join in foreclosing the use of substantive due process analysis in prearrest cases." *Id.* at 400.

Any doubt concerning *Graham*'s intent to foreclose the encroachment of the Due Process Clause on Fourth Amendment claims was removed in *Albright v. Oliver*, 510 U.S. 266, where a plurality of the Court held that the Fourth Amendment is the exclusive source of constitutional protection in *post-arrest* prosecutions. In *Albright*, a warrant was issued for the petitioner's arrest based on a previously filed criminal information charging the petitioner with the sale of a substance that looked like, but was not, an illegal drug. 510 U.S. at 268. After petitioner voluntarily surrendered, the court found probable cause to bind petitioner over for trial, but later dismissed the criminal action because the charge did not state an offense under state law. *Id.* at 269. Petitioner alleged that

under the Due Process Clause he had a protected " 'liberty interest' – to be free from criminal prosecution except upon probable cause." *Id.*

Applying the principles set forth in *Graham*, Chief Justice Rehnquist writing for the Court observed that a claim of criminal prosecution without probable cause is governed exclusively by the Fourth Amendment and not the " 'scarce and open-ended' " standards of substantive due process. *Albright*, 510 U.S. at 271-72 (citation omitted). The Court rejected petitioner's claim that a substantive due process analysis applies to any "arbitrary" use of governmental power. *Id.* at 272. The proper inquiry in the area of criminal procedure is not merely whether the governmental action was "arbitrary" under the Due Process Clause but whether the action was arbitrary under the standards set forth in the specific provision of the Bill of Rights which govern a particular setting. *Id.* at 272-74 ("[i]t was through [the] provisions of the Bill of Rights that [the] Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations").

The Court's decisions and reasoning in *Graham* and *Albright* repudiate the decisions of the Ninth Circuit and other federal appellate courts allowing pursuit claims to be brought under the Due Process Clause in those circumstances where an injury does not result from the intentional application of force by a police officer. The federal courts' fragmentation of the arrest setting for purposes of applying amorphous due process standards to some portion of it is inconsistent with the Court's recognition in *Graham* that conduct leading up to an actual arrest may fall short of the actual use of physical

force, and yet still be governed exclusively by a Fourth Amendment analysis. *Graham*, 490 U.S. at 396 ("Fourth Amendment jurisprudence has long recognized that the right to make an arrest" entails "the right to use some degree of physical coercion or *threat thereof* to effect it"). It is also inconsistent with *Albright*'s determination that the entire arrest setting, including post-arrest proceedings, is analyzed under Fourth Amendment standards.

While the federal appellate courts have not yet recognized the sharp limitations *Graham* placed on encroachment of due process claims on the Fourth Amendment in the context of police pursuits, several district courts have applied *Graham* in foreclosing end runs around the strict terms of the Fourth Amendment. *See Estate of Story v. McDuffie County*, 929 F. Supp. 1523, 1528 (1996) (due process claim by motorist who lost control of car when pursued by officers barred, because mere pursuit, without intentional application of force did not rise to the level of a constitutional violation: "The Constitution does not create and the Supreme Court and the Eleventh Circuit have never found a right which prohibits the use of high-speed in an attempt to apprehend suspects who have resisted arrest by illegally fleeing in an automobile"), *aff'd in an unpublished opinion*, 110 F.3d 798 (11th Cir. 1997); *Dismukes v. Hackathorn*, 802 F. Supp. 1442, 1449 (1992) (third party injured in a collision with a vehicle being pursued by police officers cannot assert claim because no seizure occurred under the Fourth Amendment); *Montgomery v. County of Clinton*, 743 F. Supp. 1253, 1256-57 (1990) (mother of a motorist killed after being pursued by police could not assert a constitutional claim, since the Fourth Amendment provided an explicit textual

source for evaluating police conduct, and there was no seizure by police), *aff'd in an unpublished opinion*, 940 F.2d 661 (6th Cir. 1991).

The failure of the majority of the federal courts to follow *Graham* in the pursuit setting is in part attributable to the erroneous assumption that there must always be a constitutional remedy for "arbitrary" police conduct. *Paul v. Davis*, 424 U.S. 693, 698-700 (1976), *reh'g denied*, 425 U.S. 985 (1976) (the Due Process Clause does not provide a *constitutional* remedy for every legally cognizable injury under state law which a state official may inflict). As Justice Souter observed in *Albright*, even if substantive due process rights can be inferred in order to protect against " 'substantial arbitrary impositions and purposeless restraints,' " it is only where protection under the Due Process Clause would add a "substantial increment to protection" that is not otherwise available under the specific provisions of the Bill of Rights. 510 U.S. at 287 (Souter, J., concurring).

Justice Souter's reasoning underscores the impropriety of the approach taken by the lower federal courts with respect to police pursuits. A "substantial" increment of protection over that provided by the Fourth Amendment will *not* be added by fragmenting the arrest setting – pre-seizure conduct governed by the Due Process Clause and post-seizure conduct by the Fourth Amendment. The contours of the Fourth Amendment provide a more than adequate means to govern police conduct in the context of vehicular pursuits. For example, if a pursuing officer engages in egregious conduct highly likely to result in injury to a suspect during the course of a pursuit (such as hemming a vehicle in, or sideswiping it), then it

is more than likely that it will be at the very least a jury question as to whether the officer intended to "seize" the victim under the Fourth Amendment standards enunciated by this Court in *Brower*. *See* 489 U.S. at 598-99 ("In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned or by a bullet in the heart that was meant only for the leg"); *id*. at 597 ("If . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure"). No significantly greater protection is created by divorcing police pursuits from the Fourth Amendment analysis and instead creating out of whole cloth a substantive due process right not to be pursued in a manner that is somehow "deliberately indifferent" or "shocks the conscience."

Nor can imposition of an amorphous due process standard be justified on the assumption that it will act as a greater deterrent to potential abuse by police officers in the pursuit setting than limiting liability to the strict confines of the Fourth Amendment. In *California v. Hodari*, 499 U.S. 621, the Court rejected a criminal defendant's claim that mere initiation of a pursuit by a police officer should constitute a "seizure" for Fourth Amendment purposes so that the exclusionary rule would act as a deterrent to police officers initiating an improper stop simply in order to possibly obtain evidence. As Justice Scalia, writing for the Court, observed:

> Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures. 499 U.S. at 627 (emphasis in original).

Similarly, here, in the context of vehicular pursuits by police, limiting constitutional liability to specific claims under the Fourth Amendment is unlikely to encourage abusive and otherwise unlawful conduct by police, since, as recognized by the Court in *Hodari*, presumably an officer initiates a traffic stop and subsequent pursuit for the very reason that he or she assumes the suspect will yield to the detention – thus resulting in a seizure under the Fourth Amendment. If the seizure is unlawful, i.e., not justified by probable cause or reasonable suspicion, then liability would surely follow under the Fourth Amendment. Thus, it is unlikely that any greater amount of potential police misconduct would be deterred by application of a due process as opposed to a Fourth Amendment standard.

In contrast, however, application of an amorphous "deliberate indifference" or even "shocks the conscience" standard under the Due Process Clause would likely

deter law enforcement officers from initiating and continuing pursuits even where there is clear justification or even necessity to pursue. For example, as the Ninth Circuit noted in this case, a "deliberate indifference" standard would allow a jury to impose liability where an officer's conduct in initiating and continuing a pursuit indicated a " 'conscious disregard' of public safety" by intentionally exposing someone to a known risk. *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir. 1996), *cert. granted*, 138 L. Ed. 2d 173 (1997). Yet, pursuing an individual who is fleeing at a high rate of speed or perhaps ignoring traffic regulations necessarily means that an officer is intentionally exposing the suspect to a known risk. The risk is that the suspect will lose control of the vehicle, perhaps run into another automobile or, even be struck by the police vehicle should he stop in circumstances that do not provide the officer a reasonable opportunity to avoid a collision. Similarly, with the clear vision of hindsight, a jury could well conclude that it "shocks the conscience" for a police officer to pursue a teenager fleeing at a high rate of speed who merely committed a traffic infraction, if the result of the pursuit is that the teenager loses control of the vehicle and dies in the ensuing crash.[1]

---

[1] An open-ended due process standard, whether it be "deliberate indifference" or "shocks the conscience," also leaves an officer open to rampant second-guessing by courts and juries in circumstances where, *at the time the police officer's decision is made*, he or she could *never know* whether the public safety would be greater served by continuing or terminating a pursuit. For example, if an officer initiates a traffic stop of a teenage motorist who then flees at a high rate of speed on a crowded highway or even a suburban street, he or she has two choices.

Application of the Fourteenth Amendment to police pursuits effectively creates the very sort of constitutional claim for pre-seizure conduct that the Court rejected in *Hodari*. It makes no sense to suggest that evidence would somehow not be excludable under the Fourth Amendment merely because it was dropped by defendant during an unjustified pursuit without a seizure, yet, nonetheless, hold that under identical circumstances a constitutional claim might be asserted because the pursuit violated due process. Such an analysis would most certainly give rise to motions to exclude evidence in the *Hodari* context based not upon the Fourth Amendment, but upon the Fourteenth Amendment. *Cf. Rochin v. California*, 342 U.S. 165, 172-73 (1952) (evidence obtained by stomach pumping must be excluded because conduct of officers "shocks the conscience" under the Fourteenth Amendment).

The officer could continue the pursuit and perhaps pose a risk of danger to the suspect (i.e., that he will lose control of the vehicle or collide with the officer or another vehicle) or even pose a threat to vehicles in the immediate vicinity. Alternatively, the officer could terminate the chase and hope that the fleeing driver realizes *at some point* that he is no longer being pursued, reduces speed and stops driving in a hazardous or reckless manner. However, there is always the risk that the fleeing driver will not immediately realize he is no longer being pursued, continue to flee in a reckless manner and subsequently collide with a vehicle hundreds of yards or even miles after police have terminated the pursuit. Add to the mix that it is possible that a pursuing officer's lights and sirens might have warned other drivers of the suspect's approach. Can it rationally be contended that as a matter of constitutional doctrine, a police officer must err on one side, i.e., abandoning the chase, as opposed to the other? Or, alternatively, that the *constitutionality* of the officer's conduct is determined by which course a trier of fact concludes would have been better under the circumstances?

The entire notion that an individual has some sort of "liberty interest" not to be pursued under particular circumstances is flatly contrary to the Court's strict limitation on liability under substantive due process. As the Court noted in *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Due Process Clause may impose liability on the government or its employees when they act to "restrain" personal liberty, or possibly "create" a particular danger to a specific individual. *Id.* at 199-201. Yet merely initiating and continuing a pursuit does not "restrain" an individual's liberty any more than it "seizes" an individual for purposes of the Fourth Amendment under *Hodari*. The pursuit is an *attempt* to restrain liberty, not a restraint itself. Similarly, under those circumstances, the government actor has not "created" any danger to the fleeing suspect. Any danger is created by the suspect's flight, not the mere pursuit. *Cf. Hester v. United States*, 265 U.S. 57, 58 (1924) (alcohol containers dropped by moonshiners during pursuit not subject to exclusion because "[t]he defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle"). Quite simply, it is the party being pursued who dictates the nature of the police officer's conduct. As was obvious from viewing perhaps the most widely reported and infamous police pursuit in history, if an ex-football player wants to flee police officers in a white Bronco at 35 miles an hour, the police officers will pursue at 35 miles an hour. It is only where a suspect flees at high speed and ignores proper traffic regulations that officers are forced to accelerate.

Moreover, recognition of a due process right not to be pursued suggests that in some circumstances an individual may be justified in failing to yield to authority. Yet, even assuming there are circumstances where police officers initiate pursuit for improper reasons, it defies logic to suggest that an individual has a right not to yield to the police officer, much less to violate speed and traffic regulations by fleeing. As the Court recognized in analogous circumstances in *Hodari*, if a police officer pulls an individual over for no reason, i.e., lacks probable cause or even a reasonable suspicion, then an individual need only yield to the police officer, suffer the detention, and sue for the resulting Fourth Amendment violation. But it simply cannot be the case that an individual may unilaterally determine whether or not a police officer has a reasonable basis to stop his or her vehicle, much less exercise "self-help" and put the general public in danger by fleeing in a dangerous manner.

The Fourth Amendment provides clear standards for evaluating the entire panoply of police conduct, and for imposing liability in those circumstances where the most egregious of conduct results in injury. There is simply no need to create an amorphous constitutional standard under the Due Process Clause in order to provide redress for perceived police misconduct in initiating and conducting a pursuit. That is the province of state tort law. As the Court observed in *Deshaney*:

> The people of [the state] may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not

> have it already, by changing the tort law of the State in accordance with the regular law-making process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment. 489 U.S. at 203.

California, like other states, has created a rigorous statutory scheme covering liability of police officers and public entities for injuries resulting from the initiation, conduct and termination of police pursuits.[2] These state statutes strike a balance between the clear need of police officers to engage in pursuits without fear of entanglement in litigation, yet at the same time require that consideration be given to the hazard posed not simply to

---

[2] California Vehicle Code section 17004 immunizes public employees from liability for injuries caused by emergency pursuits in authorized vehicles in the line of duty. Section 17004.7 immunizes a public entity from liability in such cases if the law enforcement agency in question has adopted a written pursuit policy containing specific criteria to be used by officers in determining whether to initiate, continue or terminate a pursuit, provides for supervisory control of the pursuit, coordination with other jurisdictions and procedures for establishing the number and priority of pursuit vehicles. *See Billester v. City of Corona*, 26 Cal. App. 4th 1107, 32 Cal. Rptr. 2d 121 (1994) (public entity entitled to immunity; pursuit policy adequate); *Brumer v. City of Los Angeles*, 24 Cal. App. 4th 983, 29 Cal. Rptr. 2d 515 (1994) (same); *Berman v. City of Daly City*, 21 Cal. App. 4th 276, 26 Cal. Rptr. 2d 493 (1993) (no immunity; pursuit policy lacks specific criteria for initiating and terminating pursuit); *Payne v. City of Perris*, 12 Cal. App. 4th 1738, 16 Cal. Rptr. 2d 143 (1993) (same); *Colvin v. City of Gardena*, 11 Cal. App. 4th 1270, 15 Cal. Rptr. 2d 234 (1992) (no immunity; policy lacks procedure for determining number and priority of pursuing vehicles).

suspects, but to the public at large. It is difficult to see what additional modicum of protection the creation of a due process claim out of whole cloth provides over and above state law.

In addition, the existence of more generous and indeed open-minded standards of liability governing these amorphous constitutional claims necessarily means that litigants will elect to proceed on federal claims in federal court instead of confining themselves to state tort remedies in state courts. In an era in which the federal courts are already overburdened, the utility in creating another constitutional cause of action would seem to be marginal at best, especially in light of a more than adequate state tort law scheme to address the same conduct.

As indicated by *Lewis* and the decisions of the other federal appellate courts, the Due Process Clause is again being expanded to encompass claims that for constitutional and policy reasons are best left to state law. It is therefore essential that this Court address the important threshold question of whether the Fourteenth Amendment applies to police pursuits.

II.

ANY RULE GOVERNING CONSTITUTIONAL LIABILITY ARISING FROM POLICE PURSUITS MUST REFLECT THE RELATIVELY LOW INCIDENCE OF SERIOUS INJURIES OR DEATHS RESULTING FROM PURSUITS AND THE SIGNIFICANT ROLE PURSUITS PLAY IN APPREHENDING THOSE WHO COMMIT THE MOST SERIOUS CRIMES.

As previously noted, amici submit the full extent of constitutional liability for police pursuits is measured by the specific protections of the Fourth Amendment. However, in crafting a rule of liability under either the Fourth Amendment, or even the open-ended standards of the Due Process Clause, amici note that it is critical to have an accurate understanding of the nature of the risks involved in police pursuits, as well as the importance of pursuits to everyday law enforcement activity.

As a threshold matter, amici observe that various groups, including the American Civil Liberties Union, have made a concerted effort to eliminate or vastly reduce police pursuits as a matter of policy.[3] Specifically, these groups contend that police pursuits are inherently

---

[3] The American Civil Liberties Union (ACLU) Foundation of Southern California issued a "report" in June 1996, *Not Just Isolated Incidents, The Epidemic of Police Pursuits In Southern California* (hereinafter sometimes *ACLU Report*). As discussed, *infra*, the ACLU report often misstates or misconstrues data, and its underlying conclusions concerning the number of pursuits that result in injury, the severity of injuries and its recommendations concerning revisions in police pursuit practices, are dubious at best.

dangerous, likely to lead to serious injury, and are generally unjustified except in those circumstances where an officer can confirm that the driver of the vehicle being pursued has committed a serious, violent felony.

As we discuss below, the State of California collects specific data with respect to police pursuits, and amicus City of Los Angeles has compiled its own data in monitoring not simply the number of police pursuits, but the severity of injuries resulting from such pursuits. This highly specific data from California, along with the national data, make it clear that the number of deaths and serious injuries resulting from police pursuits is vastly overstated. At the same time, the data confirm what common sense would lead any individual to believe – that those individuals who flee the police have generally committed serious crimes.

The assertions regarding a purportedly large number of pursuit deaths and injuries are misleading and inaccurate. In 1993, 38 people in California died during police pursuits, 8 of whom were uninvolved victims. *The Evaluation of Risk, Initial Cause vs. Final Outcome in Police Pursuits*, Business Transportation and Housing Agency Department of California Highway Patrol (Aug. 1995) at 43[4] (hereinafter *CHP Study*). That same year, 1,600 people in California died in alcohol related collisions. *Id.* The *CHP Study* put the risk of injury and death from 1994 police pursuits into proper perspective by comparing it to

---

[4] Although the *CHP Study* is limited to 1994, while the *ACLU Report* covers the years 1993-1995, inclusive, the *ACLU Report's* own numbers demonstrate the data for each of the three years is similar.

the risk of injury and death from collisions and driving under the influence (DUI) collisions.

	Collision	DUI Collision	Pursuit Collision
Injured	1 in 101	1 in 739	1 in 86,729
Killed	1 in 7,625	1 in 20,231	1 in 3,967,859

Not surprisingly, the risk of being injured in a police pursuit is substantially less than other types of automotive injuries. For example, the risk of being injured by an alcohol impaired driver is 117 times greater than being injured in a police pursuit. Similarly, a person is almost 860 times more likely to be injured in an ordinary traffic collision than in a police pursuit.

This data establishes that the risk of being killed or injured in a California police pursuit is minimal. The chances of any person being killed in a police pursuit are one in almost four million. In contrast, there is a 1 in 600,000 chance of being struck by lightning, meaning there is roughly a 6.6 times greater chance of being struck by lightning than dying in a California police pursuit. *Lightning . . . Nature's Fireworks*, National Weather Service, National Oceanic and Atmospheric Administration (1997) at 1.

Moreover, the data suggest the severity of injuries resulting from police pursuit is generally overstated. The Los Angeles Police Department statistics analyze the

severity of injuries in police pursuits.[5] From 1993 to 1995, inclusive, the Los Angeles Police Department engaged in 2,549 pursuits. *Preliminary Pursuit Updates* (1993, 1994, 1995) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit, at 1 (1993), at 1 (1994), at 1 (1995). These pursuits resulted in a total of 518 injuries, 47 (9.2%) of which were categorized as "serious." *Id.*[6]

National Statistics confirm that the risk of death from police pursuits is overstated. The National Highway Traffic Safety Commission collects data only on collisions that result in death which occur in the 50 states, the District of Columbia and Puerto Rico and these data are compiled in the Fatal Accident Reporting System (FARS). *CHP Study* at 20. The FARS data for a nine year period, from 1985-1993, inclusive, amply demonstrate that the risk of dying from a police pursuit collision is not of epidemic proportions. There are an estimated 250,000 police pursuits annually. Letitia E. Landry, *Critics Sound Alarm Over*

---

[5] The *ACLU Report* draws no distinction between very minor, almost trivial injuries, and very serious injuries. Thus, although at Table 1-1, the *ACLU Report* states that its survey of four law enforcement agencies revealed that 68 police officers, 579 suspects and 262 other individuals were "injured" in police pursuits this means very little because the report cannot and does not indicate the severity of the injuries in question.

[6] The Los Angeles Police Department categorizes injuries as A (serious injury), B (visible injury), and C (complained of pain). *See, i.e., Preliminary Pursuit Updates* (1993) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit, at 3 n.c. Injuries that are classified as visible or complained of pain (B and C injuries) are considered by the Los Angeles Police Department to be minor or very minor, respectively.

Police Chases, The Sacramento Bee, July 6, 1995, at A12. The data indicate that approximately 1% of these pursuits resulted in fatalities. In the nine year FARS study period, 2,707 people died in police pursuits. Of these fatalities, 2,156 (79%) were the suspect, 530 (20%) were uninvolved persons, and 21 (1%) were police officers. *CHP Study* at 20-21. Thus, a mean average of 2 police officers, 240 suspects, and 59 uninvolved persons, died per year in police pursuits. *Id.* at 20. In stark contrast, in 1993 alone 19,557 people in the United States lost their lives on the nation's highways in alcohol related traffic collisions. INSURANCE INFORMATION INSTITUTE, THE FACT BOOK 1997 (1997) at 103.

Amici of course, are not attempting to trivialize the risk of injuries or death during police pursuits. Rather, amici are merely putting the risk of injuries or death from pursuits into perspective. Quite simply, the risk of injury or death from police pursuits is vastly overstated and the likelihood of serious injury or death from police pursuits is substantially less than other forms of automotive injuries.

Any rule of liability governing police pursuits must also be framed with an understanding that the majority of pursuits – even those that are initiated for "minor" traffic violations – result in the apprehension of individuals who have committed the most serious crimes. A failure to understand this fact has led courts and commentators to suggest, for example, that because of their "dangerous" nature, police pursuits should be permitted only where the pursued vehicle was involved in a violent felony or, at the very least, that the gravity of the offense be a

determinative factor in evaluating the constitutional propriety of the officer's conduct.[7]

Yet such a sharp restriction of police pursuits is ill-conceived. In 1994, in California alone there were 5,339 pursuits of which 52% began with a minor traffic violation, but resulted in 73% of those apprehended being charged with felonies. *CHP Study* at 8-9. Of those suspects at least 66% were arrested for a felony other than evading police. *Id.* at 27.[8] Indeed, only 1% of those pursuits which began with an infraction resulted in the suspect being charged only with an infraction. *Id.* at 9. Thus in 1994 alone, in California 670 individuals subsequently charged with murder or lesser forms of killing, rape, kidnapping, robbery or assault were taken into custody

---

[7] The *ACLU Report* suggests pursuits should be initiated as a "last resort" and limited to apprehension of those committing "serious violent felonies including murder, assault, robbery, rape, and kidnapping." *ACLU Report* at 11-12. The Ninth Circuit's decision in this case seemingly embraces this Draconian restriction. The court stated: "This is not a case in which officers were pursuing dangerous felons. The record does not indicate that Lewis or Willard would have posed a risk to public safety had they gotten away." *Lewis v. Sacramento County*, 98 F.3d 434, 442 (9th Cir. 1996), *cert. granted*, 138 L. Ed. 2d 173 (1997).

[8] A substantial flaw in the *ACLU Report* is that it ignored an inherent limitation in the Statewide Pursuit Information Database Resource (SPIDR) data. The system requires only that a single charge be listed in the report. Thus, in pursuits where multiple felony violations occur, or felonies and multiple misdemeanors occur, only the single most serious charge will be listed. *CHP Study* at 5, 27. Accordingly, even though evading may be the only charge reported to SPIDR, the suspect could have been charged with other offenses.

following pursuits which started with traffic infractions. *Id.* at 10.

Moreover, anecdotal evidence further supports the commonsense conclusion that police pursuits prompted by an infraction lead to the arrest of extremely dangerous felons:[9]

> On February 16, 1995, Sacramento County Sheriff's deputies attempted to stop a vehicle for an infraction, an expired registration. The vehicle fled and after a brief pursuit it collided with a parked car. A carjacking victim with a bullet wound in the neck was found alive in the stolen vehicle's trunk. *CHP Study* at 29.
>
> On March 20, 1995, Glendale, California police officers attempted to stop a vehicle for running a stop sign. After a very brief pursuit,

---

[9] The *ACLU Report* claims that instead of pursuing a suspect, the use of other technologies such as helicopters would be a proper alternative. *ACLU Report* at 14. The recommendation is unrealistic. In 1993 and 1994, only about 40% of Los Angeles police pursuits could be airship assisted. In Los Angeles in 1995 and 1996, only 33% of pursuits could be airship assisted. *Preliminary Pursuit Updates* (1993, 1994, 1995, 1996) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit, at 1 (1993), at 1 (1994), at 2 (1995), at 1 (1996).

On a national scale, the *ACLU Report's* recommendation is impractical. Many geographically smaller or cash strapped police departments could not use a helicopter. The use of helicopters in lieu of vehicle pursuits would be worthless in certain terrain or in certain weather conditions. Similarly, the ACLU's assertion that an increased use of radio communication will lead to the apprehension of suspects without the necessity of a pursuit is wrong. The radio is simply a communications device; it cannot stop a suspect. Sooner or later an officer will be required to engage the suspect.

the vehicle came to a forced stop. The suspect driver was wanted for four counts of murder and four counts of armed robbery. The passenger was wanted for a parole violation. *Id.* at 30.

On April 9, 1993, Torrance, California police officers attempted to stop a motorcycle for a speed violation. When the suspect was apprehended after a pursuit the officers learned that there was an outstanding murder warrant for the suspect. *Id.* at 31.

On June 11, 1993, Simi Valley police officers observed a motorcycle rider without a helmet in violation of state law. The officers attempted to stop the suspect and he fled. After the suspect was apprehended the officers discovered that there were three outstanding warrants for his arrest; he was also wanted for brandishing and assault with a deadly weapon. *Id.*

On February 12, 1995, CHP officers in Los Angeles attempted to stop a vehicle for a speed violation. After a brief pursuit one of the suspects was taken into custody. The officers subsequently learned that the suspects were wanted for carjacking, armed robbery, attempted murder, kidnapping, and assault with a deadly weapon. These crimes occurred just before the officers attempted to make the infraction stop. *Id.* at 32.

A rule of liability that effectively restricts pursuits to serious violent felonies would handcuff law enforcement, and create substantial risks to the public. For example, under the "violent felony" rule, police officers could not pursue alcohol impaired drivers who chose to flee because the crime was not a serious violent felony. Yet,

alcohol impaired drivers are among the greatest causes of highway fatalities year after year. INSURANCE INFORMATION INSTITUTE, THE FACT BOOK 1997 (1997) at 89, 629 (between 1985 and 1994, inclusive, approximately 42,000 people per year died in highway accidents, of which approximately 39% of the fatalities were alcohol related). Quite simply, even so-called non-violent offenses have enormous potential to cause serious injuries or death.[10]

Plainly, the data confirm that the chances of any person being killed or injured in any single pursuit are slight. If the fleeing suspect is factored out from the data, then the chances of any police officer or uninvolved person being killed or seriously injured during a pursuit are extremely remote. In contrast, the number of serious criminals apprehended in pursuits – including pursuits initiated as a result of a "mere" infraction – is significant.

---

[10] The ACLU's reasoning is substantially flawed in other respects. The *ACLU Report*, at 8, states in reference to Table 1-7, which compares initial violations to final charges between the Los Angeles Police Department and the Riverside County Sheriff Department, that the LAPD data encompasses the final six months of 1995 and the sheriff's department data encompasses all of 1995. In actuality, the Los Angeles Police Department data were for all of 1995. *Preliminary Pursuit Updates* (1995) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit at 2. The *ACLU Report* at 8, Table 1-7 for example, also confuses the distinct concepts of booking charges and charges actually filed. SPIDR data and arrest data deal only with booking charges. The *ACLU Report*, however, misinterpreted the data and falsely asserted that the charges were those that were "actually filed."

Any rule governing liability for police pursuits must be framed in light of these factors.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment of the Ninth Circuit should be reversed.

Dated: August 6, 1997.

Respectfully submitted,

WILLIAM C. KATZENSTEIN
County Counsel
County of Riverside

JAMES K. HAHN
City Attorney
City of Los Angeles
G. DANIEL WOODARD
Senior Assistant City Attorney
GREGORY P. ORLAND*
Deputy City Attorney

JOHN J. SANSONE
County Counsel
County of San Diego
DIANE BARDSLEY
Chief Deputy

BERNARD C. BARMAN, SR.
County Counsel
County of Kern

H. PETER KLEIN
County Counsel
County of Mendocino

JEANINE BENNETT NADEL
Deputy County Counsel

ROBERT SHULMAN
County Counsel
County of Plumas

ALAN K. MARKS
County Counsel
County of San Bernardino
MICHAEL A. SACHS
Chief Deputy County Counsel

JAMES B. LINDHOLM, JR.
County Counsel
County of San Luis Obispo
JAC A. CRAWFORD
Assistant County Counsel

STEVEN M. WOODSIDE
County Counsel
County of Santa Clara
JAMES RUMBLE
Chief Deputy

FRANK J. DEMARCO
County Counsel
County of Siskiyou

JAMES P. BOTZ
County Counsel
County of Sonoma

NELSON D. BUCK
County Counsel
County of Tehama

GREINES, MARTIN, STEIN &
RICHLAND LLP
TIMOTHY T. COATES

*Counsel of Record

Attorneys for Amici Curiae County of Riverside, City of Los Angeles, County of San Diego, County of Sacramento, County of Kern, County of Mendocino, County of Plumas, County of San Bernardino, County of San Luis Obispo, County of Santa Clara, County of Siskiyou, County of Sonoma, and County of Tehama

Supreme Court, U.S.
FILED
AUG 8 1997
CLERK

No. 96-1337 (9)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, AND JAMES EVERETT SMITH,
Petitioners,

v.

TERI LEWIS AND THOMAS LEWIS, Personal Representatives of the Estate of PHILIP LEWIS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CHARLES ROTHFELD
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

36 pp

QUESTION PRESENTED

Amici will address the following question:

Whether a police pursuit that results in unintended injury is actionable as a violation of substantive due process.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
A POLICE PURSUIT RESULTING IN UNINTENDED INJURY IS NOT ACTIONABLE UNDER THE DUE PROCESS CLAUSE	7
A. The Fourth Amendment Defines The Process That Is Due To An Individual During A Police Pursuit	8
B. Unintended Or Accidental Injuries Are Not Actionable As A Violation Of Substantive Due Process	13
C. The Regulation Of Police Pursuits Is Appropriately Left To The States And Local Governments	23
CONCLUSION	30

TABLE OF AUTHORITIES

Cases — Page

Albright v. *Oliver*, 510 U.S. 266 (1994) 6, 9, 13, 14
Baum v. *Ohio State Highway Patrol*, 650 N.E.2d 1347 (Ohio 1995) 28
Bittner v. *City of St. Louis Police Bd. of Comm'rs*, 925 S.W.2d 495 (Mo. Ct. App. 1996) 28
Breithaupt v. *Abram*, 352 U.S. 432 (1957) 20, 21
Brower v. *County of Inyo*, 489 U.S. 593 (1989) ..... *passim*
California v. *Hodari*, 499 U.S. 621 (1991) 12
Cavanaugh v. *Andrade*, 550 N.W.2d 103 (Wis. 1996) 28
City of Lancaster v. *Chambers*, 883 S.W.2d 650 (Tex. 1994) 28
City of Pinellas Park v. *Brown*, 604 So.2d 1222 (Fla. 1992) 28
Cline v. *Rabson*, 856 P.2d 1 (Colo. Ct. App. 1992) 28
Colby v. *Boyden*, 400 S.E.2d 184 (Va. 1991) 28
Collins v. *City of Harker Heights*, 503 U.S. 115 (1992) ..... *passim*
Currie v. *Lao*, 592 N.E.2d 977 (Ill. 1992) 28, 29
Daniels v. *Williams*, 474 U.S. 327 (1986) ..... *passim*
DeShaney v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) 16, 17, 19
DeWald v. *State*, 719 P.2d 643 (Wyo. 1986) 28
Estate of Aten v. *City of Tucson*, 817 P.2d 951 (Ariz. 1991) 28
Estelle v. *Gamble*, 429 U.S. 97 (1976) 21, 21-22
Fiser v. *City of Ann Arbor*, 339 N.W.2d 413 (Mich. 1983) 28
Fiedler v. *Stonack*, 661 A.2d 231 (N.J. 1995) 28
Graham v. *Connor*, 490 U.S. 386 (1989) 6, 9, 10, 22
Haynes v. *Hamilton County*, 883 S.W.2d 606 (Tenn. 1994) 28
In re Winship, 397 U.S. 358 (1970) 10
Lowrimore v. *Dimmit*, 797 P.2d 1027 (Ore. 1990) 28
Mason v. *Bitton*, 534 P.2d 1360 (Wash. 1975) 28
Morais v. *Yee*, 648 A.2d 405 (Vt. 1994) 28
Moran v. *Burbine*, 475 U.S. 412 (1986) 21
Oberkramer v. *City of Ellisville*, 706 S.W.2d 440 (Mo. 1986) 28

TABLE OF AUTHORITIES—Continued

Page

Parratt v. *Taylor*, 451 U.S. 527 (1981) 15
Peak v. *Ratliff*, 408 S.E.2d 300 (W. Va. 1991) 28
Roach v. *City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989) 10
Rochin v. *California*, 342 U.S. 165 (1952) 7, 20, 21
Soldal v. *Cook County*, 506 U.S. 56 (1992) 9, 10, 11
Tennessee v. *Garner*, 471 U.S. 1 (1985) 19, 24
Terry v. *Ohio*, 392 U.S. 1 (1968) 23
Tetro v. *Town of Stratford*, 458 A.2d 5 (Conn. 1983) 28
Thomas v. *City of Richmond*, 892 P.2d 1185 (Cal. 1995) 5, 28
Thompson v. *Payne*, 453 S.E.2d 803 (Ga. Ct. App. 1995) 28
United States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) 9
United States v. *Lanier*, 117 S. Ct. 1219 (1997) 11
United States v. *Mendenhall*, 446 U.S. 544 (1980) 11, 12
United States v. *Salerno*, 481 U.S. 739 (1987) 20-21
Vance v. *Bradley*, 440 U.S. 93 (1979) 15
Washington v. *Davis*, 426 U.S. 229 (1976) 15
Washington v. *Glucksberg*, 117 S.Ct. 2258 (1997) 21
Whitley v. *Albers*, 475 U.S. 312 (1986) 21, 22
Zapp v. *Kakuris*, 847 P.2d 150 (Colo. Ct. App. 1992) 28

Statutes

42 U.S.C. § 1983 4
Wis. Stat. § 346.03(6) 27

Miscellaneous

Geoffrey P. Alpert & Roger G. Dunham, POLICE PURSUIT DRIVING (1990) 25, 26
Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521 (1989) 25

TABLE OF AUTHORITIES—Continued

Page

Robert Crew *et al.*, *Probabilities and Odds in Hot Pursuit: A Benefit-Cost Analysis*, 23 J. CRIM. JUST. 417 (1995) 25

Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993) 29

Edmund F. Fennessy *et al.*, U.S. Dep't of Transp., A STUDY OF THE PROBLEM OF HOT PURSUIT BY THE POLICE (1970) 23-24, 24

NATIONAL POLICE PURSUIT POLICY ACT OF 1995, S. 923, 104th Cong. (1995) 27

Hugh Nugent *et al.*, National Institute of Justice, U.S. Dep't of Justice, RESTRICTIVE POLICIES FOR HIGH-SPEED POLICE PURSUIT (July 1983) 24

Richard G. Zevitz, *Police Civil Liability and the Law of High Speed Pursuit*, 70 MARQ. L. REV. 237 (1987) 26-27, 27

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 96-1337

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, AND JAMES EVERETT SMITH,
Petitioners,
v.
TERI LEWIS AND THOMAS LEWIS, Personal Representatives of the Estate of PHILIP LEWIS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issues presented in this case: whether and by what standard a state law enforcement official who engages in a vehicular pursuit resulting in injury to the fleeing suspect may be held liable under the Fourteenth Amendment for a viola-

tion of substantive due process where the injury to the suspect was accidental or unintentional.

This case concerns an essential and longstanding tool for enforcing and maintaining respect for the rule of law. In today's highly mobile society, vehicular pursuits are vital to law enforcement's ability to apprehend suspects, conduct investigatory stops, and enforce ordinary traffic laws. The Court's decision regarding the extent to which such pursuits are subject to constitutional scrutiny under the Fourteenth Amendment will directly affect *amici* and their members: this Court's decision will have an impact not only on the everyday decisions of law enforcement officials across the country in conducting vehicular pursuits, but also on the ability of state and local governments to regulate police practices. Moreover, subjecting vehicular pursuits to searching constitutional review will add substantially to the expense of maintaining a police force as litigation and liability increase. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. On May 22, 1990, at approximately 8:30 p.m., Petitioner Sacramento County Sheriff's Deputy James E. Smith, along with Sacramento Police Officer Murray Stapp, responded to a call about a fight in progress. Pet. App. 46. After completing the call, the two officers returned to their marked patrol cars. *Id.* at 2-3. Officer Stapp heard a motorcycle engine revving and then saw the motorcycle approach at a high rate of speed. *Id.* at 46. Brian Willard was driving the motorcycle, while Philip Lewis was a

[1] The parties' letters of consent pursuant to Rule 37.3 of the Rules of this Court have been filed with the Clerk of the Court.

passenger. *Ibid.* Both boys were teenagers. Neither wore a helmet or was involved in the fight to which the officers had responded. *Id.* at 3. Attempting to stop the motorcycle, "Officer Stapp yelled to the motorcyclists to pull over," *id.* at 46-47, and positioned his vehicle closer to Deputy Smith's, *id.* at 3. But Willard veered the motorcycle in between the two police cars and then "accelerated past the police officers." *Id.* at 47.

Deputy Smith and Officer Stapp pursued the motorcycle. Deputy Smith attempted to contact his headquarters in accordance with Department policy, but failed to make contact because his radio was on the wrong channel. Pet. App. 47. The pursuit involved three 90-degree left turns and passed through four stop lights. *Id.* at 3. The entire pursuit lasted 75 seconds and covered 1.3 miles. *Ibid.* "The average speed of the vehicles was calculated to be 60 miles per hour, with high speeds of up to 100 miles per hour." *Ibid.* At times during the pursuit, Deputy Smith followed behind the motorcycles at a distance of approximately 100 to 150 feet. *Id.* at 4.

The pursuit ended at or near a crest in the road. After passing over the crest, the motorcyclists attempted to make a hard left turn onto an intersecting street. The motorcycle skidded and came to a halt on the road, failing to make the turn. Seeing the motorcycle stopped in the street, Deputy Smith "slammed on his brakes but was unable to stop his vehicle in time." Pet. App. 4. His patrol car skidded 147 feet and then struck Lewis. *Ibid.* Lewis sustained massive internal injuries and was pronounced dead on the scene. *Ibid.*

2. As the representatives of the estate of Philip Lewis, Respondents Teri and Thomas Lewis, Philip's

parents, brought suit in Sacramento County Superior Court against petitioners Sacramento County, the Sacramento County Sheriff's Department, and Deputy Smith. In their complaint, respondents raised a federal claim under 42 U.S.C. § 1983, alleging that Deputy Smith acted recklessly and thus deprived their son of due process in violation of the Fourteenth Amendment, and that the County and its Sheriff's Department were liable for inadequately training their officers and for having a policy that was deliberately indifferent to their son's constitutional rights. Pet. App. 48-49. Respondents also asserted a claim for negligence under California law. *Id.* at 49.

Petitioners removed the case to federal district court, which granted summary judgment on the § 1983 claims in favor of the petitioners. Without deciding whether Deputy Smith's conduct violated Lewis's right to substantive due process, the district court concluded that Deputy Smith was entitled to qualified immunity because it was not clearly established that Lewis had a substantive due process right in the context of a high-speed police pursuit. Pet. App. 52-53. In addition, the district court concluded that there was no evidence that Sacramento County and its Sheriff's Department inadequately trained Deputy Smith or had a pursuit policy that was deliberately indifferent to Lewis's constitutional rights: Deputy Smith received training in high speed driving and the Sheriff's Department's pursuit policy met or exceeded California state standards. *Id.* at 55-56.

In addition, the district court granted summary judgment in favor of Deputy Smith with respect to respondents' state tort claim, concluding that officers are entitled to immunity under California Vehicle

Code § 17004. *Id.* at 56-57. But the court dismissed without prejudice respondents' tort claims against Sacramento County and its Sheriff's Department, declining to decide whether these municipal defendants also had immunity under California law. *Id.* at 58-59.[2]

3. On appeal, the Ninth Circuit reversed the district court's grant of summary judgment to Deputy Smith, but affirmed the grant of summary judgment to Sacramento County and its Sheriff's Department. Pet. App. 2.[3] Addressing the federal claim against Deputy Smith, the court of appeals ruled that a genuine issue of material fact existed as to whether Deputy Smith had violated Lewis's right to substantive due process—a right, the court of appeals held, that is violated if a high-speed police pursuit shows "deliberate indifference to, or reckless disregard for, a person's right to life and personal security." *Id.* at 21. In addition, the court of appeals ruled that Deputy Smith was not entitled to qualified immunity because the law was clearly established that a police officer may be held liable under § 1983 if his conduct was "sufficiently egregious." *Id.* at 35. The court of appeals relied upon two of this Court's decisions regarding the use of excessive force under the Fourth

---

[2] The California Supreme Court subsequently held that municipalities are not entitled to immunity from such suits under the California Vehicle Code. See *Thomas* v. *City of Richmond*, 892 P.2d 1185, 1187 (Cal. 1995).

[3] As to the federal claims against Sacramento County and its Sheriff's Department, the court of appeals concluded that respondents failed to raise a genuine issue of material fact to support their contention that the County's training and pursuit policies were deliberately indifferent to Lewis's rights. Pet. App. 42-43.

Amendment, three decisions from other circuits involving high-speed police pursuits (none of which found a violation of substantive due process), and two cases from its own circuit involving substantive due process claims outside the context of police pursuits. *Id.* at 27-37.

SUMMARY OF ARGUMENT

A. The court of appeals was incorrect in concluding that respondents have presented a cognizable substantive due process claim. As an "explicit textual source of constitutional protection" that addresses the conduct of law enforcement officials in conducting "seizures" of persons, it is the Fourth Amendment that defines the process due an individual who is the subject of a police pursuit. *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). And "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide to analyzing these claims.'" *Albright* v. *Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (citation omitted). Appropriately analyzed under the Fourth Amendment, there was no constitutional violation in this case.

B. If due process analysis is not wholly displaced in this case by the Fourth Amendment, the court of appeals applied an incorrect substantive due process standard in holding that recklessness may give rise to a constitutional violation. In fact, the Due Process Clause is concerned with "*deliberate* decisions of government officials to deny a person life, liberty, or property." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (emphasis in original). This conclusion follows from the language, history, and purpose of the Clause, which was designed to prevent governmental power from being used for purposes of oppression. The Ninth Circuit's recklessness standard is inconsistent with this understanding. Moreover, substantive due process comes into play only when the challenged governmental action was so brutal or offensive that it "shocks the conscience." *Rochin* v. *California*, 342 U.S. 165, 172 (1952). Reckless conduct does not meet that exacting standard.

C. Addressing the consequences of reckless or negligent police conduct is appropriately left to state tort law. In setting the limits on liability in this area, a host of considerations go into balancing the interests of injured parties on the one hand and the needs of effective law enforcement on the other. Tort law is well-adapted to striking that balance. And many States provide for liability on the part of the officer or his employer when such pursuits result in injury. Moreover, most States and localities have adopted policies regulating high-speed vehicular pursuits. In these circumstances, the relevant choices are best made "by locally elected representatives, and not by federal judges interpreting the basic charter of Government for the entire country." *Collins* v. *City of Harker Heights*, 503 U.S. 115, 129 (1992).

ARGUMENT

A POLICE PURSUIT RESULTING IN UNINTENDED INJURY IS NOT ACTIONABLE UNDER THE DUE PROCESS CLAUSE

The court of appeals' holding marks a dramatic departure from the principles laid down by this Court. The decision below substitutes a vague and novel substantive due process standard for the Fourth

Amendment inquiry that ordinarily applies to govern police behavior. At the same time, the Ninth Circuit superimposed a "recklessness" liability standard more appropriate for a tort case than for a suit invoking the "large concerns" of substantive due process. *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986). And by declaring reckless conduct a due process violation, the court of appeals greatly broadened—and, in the process, diminished—a constitutional guarantee designed to serve as a bulwark against governmental oppression. That decision accordingly should not stand.

A. The Fourth Amendment Defines The Process That Is Due To An Individual During A Police Pursuit

As a threshold matter, the court of appeals was wrong in concluding that respondents have presented a cognizable substantive due process claim under the Fourteenth Amendment. See Pet. App. 10. The Fourth Amendment, which protects "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures," defines the full measure of constitutional protection from excessive force that is accorded to an individual who is being pursued by law enforcement officials. This means that in the context of a police pursuit, individuals have a constitutional right to "be secure in their persons" only to the extent they are "seized" in an unreasonable manner. The court of appeals went astray in disregarding that principle.

1. As "an explicit textual source of constitutional protection" that addresses the extent to which law enforcement officials, in attempting to make an arrest or investigatory stop, may invade "the right of the people to be secure in their persons," the Fourth

Amendment defines the process that is due to an individual subject to a police pursuit. *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). In *Graham*, the Court accordingly held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Ibid.* (emphasis in original).

This constitutional principle is based on the recognition that, where questions of criminal procedure are involved, "the specific guarantees of the various provisions of the Bill of Rights embodied in the first 10 Amendments to the Constitution" define all the process that is due to the individual. *Albright* v. *Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) Accordingly, "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Ibid.* (quoting *Graham*, 490 U.S. at 395).[4]

---

[4] To be sure, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal* v. *Cook County*, 506 U.S. 56, 70 (1992) (unauthorized eviction implicated Fourth Amendment search and seizure clause and Fourteenth Amendment due process clause); see *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 50 (1993) (seizure of property for civil forfeiture implicated Fourth Amendment search and seizure clause and Fifth Amendment procedural due process clause). However, these cases have not disturbed the principle that claims involving the alleged use of excessive force by police officers should be analyzed solely under

In this case, the particular government behavior at issue is the vehicular pursuit of fleeing suspects conducted by law enforcement officials in the course of an attempted investigatory stop. The Fourth Amendment plainly addresses the extent to which this sort of government behavior is subject to constitutional scrutiny, and it accordingly is that provision that strikes the appropriate balance between the interest of the individual in personal security and the interest of society in deterring criminal behavior. See *Roach* v. *City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989). Indeed, the peculiarity of the court of appeals' approach becomes clear when one considers what would have happened had Deputy Smith *succeeded* in seizing Lewis. Imagine that Deputy Smith set out to stop Lewis by running him off the road—an outcome that plainly would have constituted a seizure within the meaning of the Fourth Amendment. See *Brower* v. *County of Inyo*, 489 U.S. 593, 598-599 (1989). In that event, both the collision and foregoing pursuit (which would have occurred in "the course of the arrest [or] investigatory stop") would have been scrutinized under the Fourth Amendment. *Graham*, 490 U.S. at 395. Yet it is very odd to suggest that an otherwise identical portion of

---

the Fourth Amendment rather than the Fourteenth Amendment's substantive due process test because "both provisions target[] the same sort of governmental conduct" and, as the "more 'explicit textual source of constitutional protection,' " the Fourth Amendment defines all the process that is due. *Soldal*, 506 U.S. at 70. Of course, the Fourteenth Amendment's guarantee of *procedural* due process may require additional criminal procedures that are not explicitly mentioned in the Bill of Rights but that are considered essential to fundamental fairness. See, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970) (proof beyond a reasonable doubt).

this course of police conduct is reviewed under a different constitutional provision because the police ultimately did not complete the seizure.

Moreover, the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment (at least insofar as respondents seek to apply it in this setting) share the same purpose: preventing affirmative misuses of governmental power. "The purpose of the Fourth Amendment is * * * 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " *United States* v. *Mendenhall*, 446 U.S. 544, 553-554 (1980) (opinion of Stewart, J.) (citation omitted). Likewise, the Due Process Clause "serves to prevent governmental power from being 'used for purposes of oppression.' " *Daniels*, 474 U.S. at 331 (citation omitted). It therefore is manifest that "both provisions target[] the same sort of governmental conduct" and that the Fourth Amendment, as the "more 'explicit source of constitutional protection,' " should control. *Soldal*, 506 U.S. at 70 (citation omitted).[5]

2. Viewed as a Fourth Amendment matter, it is plain that Deputy Smith did not violate the Constitution because there was no seizure. The Fourth Amendment targets *intentional* acts of detention or control by law enforcement officials, "not the accidental effects of otherwise lawful government conduct." *Brower*, 489 U.S. at 596. In *Brower*, for example, the Court considered a Fourth Amendment

---

[5] Of course, the Due Process Clause may provide an individual with protection from physical abuse that is committed by a state official under the color of state law, but outside the context of an investigatory stop or arrest. See, *e.g.*, *United States* v. *Lanier*, 117 S.Ct. 1219 (1997).

claim by the estate of an individual who "was killed when the stolen car that he had been driving at high speeds for approximately 20 miles in an effort to elude pursuing police crashed into a police roadblock." *Id.* at 594. The Court held that the claim was cognizable under the Fourth Amendment because the means by which the individual was stopped (that is, the roadblock) was *intentionally* applied by the law enforcement officials to block the individual's movement. *Id.* at 599. In reaching that decision, this Court explained that a Fourth Amendment violation requires a "seizure" of the person, which means an intentional restraint of the individual's movement. *Id.* at 596.

But where the restraint of the person results by accident, as was the case here, there is no seizure of the person. See Pet. App. 10 n.3 ("It is undisputed that Smith did not intend to hit Lewis with his patrol car. There was thus no Fourth Amendment violation."); see also *California* v. *Hodari*, 499 U.S. 621, 628 (1991) (no seizure occurs during pursuit where the officer's " 'show of authority' did not produce his stop") (quoting *Brower*, 489 U.S. at 597). As the Court explained in *Brower*, there is no seizure where the fleeing suspect is stopped by accidental or unintended means; a seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower*, 489 U.S. at 597 (emphasis in original). And where a police pursuit does not involve a seizure, the conduct necessarily does not violate the Constitution: "[o]nly when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." *Mendenhall*, 446 U.S. at 553 (opinion of Stewart, J.). *See Hodari*, 499 U.S. at 625-626.

The court of appeals' recognition of a substantive due process claim for an unintended restraint of an individual's liberty thus upsets the balance struck by the Fourth Amendment in defining the rights of persons to be secure from law enforcement investigations. That court's use of substantive due process impermissibly "impose[s] additional requirements upon * * * the States' criminal processes [that were] already addressed (and left without such requirements) by the Bill of Rights." *Albright*, 510 U.S. at 276 (Scalia, J., concurring). It subjects to constitutional scrutiny conduct by state law enforcement officials that the Fourth Amendment already addressed and left outside its purview: the "unintended consequences of government action" related to a police pursuit. *Brower*, 489 U.S. at 596.

B. Unintended Or Accidental Injuries Are Not Actionable As A Violation Of Substantive Due Process

For the foregoing reasons, the Fourth Amendment provides the exclusive source of constitutional protection for individuals injured in a police pursuit. If the Court rejects that conclusion, however, *amici* submit that the court of appeals' decision is in any event erroneous because it adopts an incorrect standard of proof for violations of substantive due process: the Due Process Clause is concerned with "*deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 331 (emphasis in original). As a consequence, where there has been no purposeful decision to work such a deprivation, the Due Process Clause simply is not implicated. In addition, a violation of substantive due process requires more than a "reckless disregard" for the safety of others; there must be a determination

that the conduct in question was "shocking to the conscience" or "arbitrary" in the constitutional sense. The court of appeals erred in adopting a different standard.

1. The Ninth Circuit held that "the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security." Pet. App. 21. Under the court of appeals' standard, law enforcement officials may be held liable for a violation of substantive due process for "instituting and then continuing" a vehicular pursuit of a suspect if it is determined that "a reasonable officer would have known that to do so was in reckless disregard" for the suspect's or public safety. *Id.* at 23. This approach would recognize a substantive due process violation even where the injury was merely accidental. Such a radical expansion of substantive due process has no support in the text or history of the Due Process Clause, or in this Court's precedents interpreting the provision.

"As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and openended." *Collins*, 503 U.S. at 115. Instead, the Court has been faithful to the central purpose of the provision: "[t]he Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression." *Ibid.* (citations and internal quotation marks omitted). See *Albright*, 510 U.S. at 271-272 (plurality opinion) (noting limited circumstances in which the Court has applied protections of substantive due process). Although this Court has

not had "occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause" (*Daniels*, 474 U.S. at 334 n.3), the principles established by this Court support the requirement of intentional conduct to prove violations of due process.

The Due Process Clause of the Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." The most natural reading of this language would limit it to deliberate actions by state officials calculated to take life, liberty, or property away from an individual. See *Parratt* v. *Taylor*, 451 U.S. 527, 548 (1981) (Powell, J., concurring in result) ("A 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss."). The constitutional text thus suggests that an unintended loss of life, liberty, or property simply is not cognizable under the Due Process Clause.[6]

---

[6] Such a requirement of intent rests on the understanding that the constitutional safeguards against governmental abuse of power are generally not designed to address "the accidental effects of otherwise lawful government conduct." *Brower*, 489 U.S. at 596; see also *Washington* v. *Davis*, 426 U.S. 229, 240 (1976) (denial of equal protection under the Fourteenth Amendment requires proof of discriminatory intent). Moreover, the Due Process Clause of the Fifth Amendment imposes on the federal government restraints equivalent to those imposed upon the States by the Equal Protection Clause. See, *e.g.*, *Vance v. Bradley*, 440 U.S. 93, 94-95 n.1 (1979). The Ninth Circuit's interpretation of due process thus would require that the single word "deprive" in the Fifth Amendment be interpreted to reach only intentional acts on some occasions—when the equal protection component of the

This conclusion is confirmed by the history and purpose of the Clause. As the Court recognized in *Daniels*, "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." 474 U.S. at 331 (collecting cases) (emphasis in original). The Court thus has recognized

> the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, * * * "was intended to secure the individual from the arbitrary exercise of the powers of government[.]" * * * By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain actions regardless of the fairness of the procedures used to implement them, * * * it serves to prevent governmental power from being "used for purposes of oppression[.]"

Id. at 331 (citations omitted). This means that, "[i]n the substantive due process analysis, it is the State's *affirmative act of restraining the individual's freedom to act on his own behalf*—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause * * *." *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989) (emphasis added).

The Court's decisions have been consistent in applying this understanding, repeatedly rejecting attempts

---

amendment is invoked—but to reach reckless acts when the Due Process Clause is at issue.

to transform the Due Process Clause into a residuary provision protecting individuals from unsafe conditions created or left uncorrected by the State. In *Daniels*, for example, the Court made clear that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." 474 U.S. at 328 (emphasis in original). Similarly, the Court held in *DeShaney* that the Due Process Clause is not implicated when the State fails to provide care or adequate protective services to an individual who is not within its custody. See 489 U.S. at 194. While recognizing the natural impulse "to find a way for [the injured parties] to receive adequate compensation for the grievous harm inflicted upon them," the Court concluded that, absent an affirmative act by the State, the State's duty of care was a matter to be redressed by state tort law, not the Constitution. *Id.* at 202-203.

Likewise, in *Collins* the Court rejected the argument that a city's "deliberate indifference" to the safety of one of its employees who died by asphyxia during the course of his employment "was arbitrary government action that must 'shock the conscience.' " 503 U.S. at 126. Because the "deliberate indifference" claim was "analogous to a fairly typical state-law tort claim," it was a matter to be addressed by the States and municipalities, "rather than by federal judges interpreting the basic charter of Government for the entire country." *Id.* at 128-129.

Against this background, the Ninth Circuit's holding ultimately is flawed because it has no foundation in constitutional principle. After all, this Court rejected the contention that negligent acts by government officials violate due process because such an

expansive reading of the Clause has no relationship to the purpose of restraining governmental "oppression." See *Daniels*, 474 U.S. at 330-333. And while reckless conduct may present a greater danger of injury than does negligence, that difference likewise is not relevant to the purposes of the Due Process Clause. Of course, actions that are reckless may appropriately be actionable in tort. The Constitution, however,

> deals with the large concerns of governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. [The Court] ha[s] previously rejected reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States[.]"

Daniels, 474 U.S. at 332 (citations omitted). And "[i]t is no reflection on either the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Id.* at 333. See *Collins*, 503 U.S. at 129.

Contrary to the court of appeals' conclusion, the State thus does not "deprive" the fleeing individual or the general public of any due process right simply by initiating and then continuing a high-speed police pursuit. There of course is no "deprivation" of life or liberty in the pursuit itself, even if the pursuit is initiated and continued in reckless disregard for the pursued individual's safety; during the course of the pursuit, the fleeing individual is not restrained by any affirmative act of the State.[7] The deprivation

[7] For instance, a fleeing suspect who is pursued by law enforcement officials but eludes capture surely could not have been deprived of life or liberty during the pursuit, even if the law enforcement officials initiated and continued the pursuit in reckless disregard for the suspect's safety. Cf. *Tennessee v. Garner*, 471 U.S. 1, 31 (1985) (O'Connor, J., dissenting) (expressing skepticism about "allow[ing] criminal suspects who successfully escape to return later with § 1983 claims against officers who used, albeit unsuccessfully, deadly force in their futile attempt to capture the fleeing suspect").

occurs, if at all, when there is an affirmative act by the State that vitiates the individual's liberty. And in this case, there was no such affirmative act by the State because Officer Smith "did not intend to hit Lewis with his patrol car." Pet. App. 10 n.3. Lewis's restraint from movement and loss of life were accidental and thus do not constitute a "deprivation" of due process.

Recognizing a deprivation of due process in these circumstances would work an unprecedented expansion of substantive due process, conferring a cause of action upon individuals who have not been restrained in their liberty by an affirmative act of the State. Cf. *DeShaney*, 489 U.S. at 198-200 (distinguishing cases in which duty of care was imposed on State for individuals within its custody). Such a precedent potentially would expose all sorts of state conduct to constitutional scrutiny, such as the State's unsafe maintenance of its roadways or water supply, its use of asbestos in its buildings, or its contamination of the air with pollutants in a manner that is claimed to be reckless. The Fourteenth Amendment was not meant to address these sorts of dangers "that attend living together in society." *Daniels*, 474 U.S. at 332.

2. The decision below also is flawed for a second, related reason. Obviously, not all intentional depri-

vations of life, liberty, or property deny the affected individual due process; a constitutional violation occurs only when the government's conduct is so "brutal" or "offensive" that it "shocks the conscience." This constitutional standard was first enunciated in *Rochin* v. *California*, 342 U.S. 165, 172 (1952), where the Court held that forced pumping of a suspect's stomach was a violation of due process because such coercive conduct "shocks the conscience." The Court found that action to be conscience-shocking because it involved a kind of "brutal conduct" comparable to coerced confessions that "offend the community's sense of fair play and decency." *Id.* at 173.

In the 45 years following *Rochin*, the Court has consistently applied the "shocks the conscience" standard to substantive due process claims involving allegedly arbitrary deprivations of life or liberty by individual government officials acting apart from a specific statutory or regulatory scheme. In *Breithaupt* v. *Abram*, 352 U.S. 432, 435 (1957), for instance, the Court held that the taking of a sample of blood from an individual "under the protective eye of a physician" was not "brutal" or "offensive" in the sense required to "shock[] the conscience." *Id.* at 435-437. In the Court's most recent consideration of such a substantive due process claim, it likewise held that a city's alleged conduct in failing to provide a safe working environment to its employees did not state a claim under the Fourteenth Amendment because the conduct could not "properly be characterized as arbitrary, or conscience shocking, in the constitutional sense." *Collins*, 503 U.S. at 128.[8]

[8] See also *United States* v. *Salerno*, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' ") (citations omitted); *Moran* v. *Burbine*, 475 U.S. 412, 433-434 (1986) (no substantive due process violation where conduct is not so egregious as to "shock[] the sensibilities of civilized society as to warrant federal intrusion into the criminal processes of the States"); *Whitley* v. *Albers*, 475 U.S. 312, 327 (1986) (" 'conduct that shocks the conscience' or 'afford[s] brutality the cloak of law' * * * violates the Fourteenth Amendment") (quoting *Rochin*, 342 U.S. at 173).

The Ninth Circuit's deliberate indifference or recklessness standard cannot be reconciled with these decisions: it would permit violations of substantive due process without any determination that the alleged conduct was "brutal," "offensive," or "shocking to the conscience." At the same time, by hinging liability on the official's state of mind, the "deliberate indifference" standard fails to take into consideration the "community's sense of 'decency and fairness.' " *Breithaupt*, 352 U.S. at 436 (recognizing that a "blood test procedure has become routine in our everyday life"). The deliberate indifference standard thus ignores "our Nation's history, legal traditions, and practices," which provide "crucial 'guideposts for responsible decisionmaking' " in the due process analysis. *Washington* v. *Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (quoting *Collins*, 503 U.S. at 125).

Indeed, in only one area has the Court adopted a standard of deliberate indifference as the measure of evaluating the constitutionality of state conduct. In *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976), the Court considered an Eighth Amendment claim of cruel and unusual punishment in the context of a prisoner's failure to receive medical treatment. This Court held "that deliberate indifference to serious

medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Ibid.* (citation omitted). This standard was appropriate for evaluating the State's failure to provide medical care to prisoners within its custody "because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities" and because medical care generally did not involve situations requiring split-second decisions. *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986).

In *Whitley*, however, the Court rejected the application of the "deliberate indifference" standard in evaluating a prisoner's claim that prison officials subjected him to cruel and unusual punishment by shooting him in the course of their attempt to quell a prison riot. The Court reasoned that "a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Ibid.*

The same holds true for police pursuits. The State has important obligations to enforce the law, to apprehend suspects, to investigate suspicious conduct, and to prevent fleeing suspects from endangering others or themselves. Typically, as was true in this case, whether to initiate and then to continue a pursuit requires snap decisions: the law enforcement officer must act in great "haste [and] under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. at 320. See *Graham*, 490 U.S. at 397. The entire pursuit in this case, for example,

lasted all of 75 seconds. To adopt a "deliberate indifference" standard to evaluate this conduct would undervalue the importance of the State's obligations in law enforcement and would invite wholesale second-guessing of decisions that must be made under considerable pressure.

C. The Regulation Of Police Pursuits Is Appropriately Left To The States And Local Governments

The Court has long recognized "the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." *Terry* v. *Ohio*, 392 U.S. 1, 12 (1968). This is especially true for "police conduct * * * [involving] swift action predicated upon the on-the-spot observations of the officer." *Id.* at 20. Principles of federalism advise that the state and local governments have the primary responsibility to oversee the practices of their police departments. While the Fourth Amendment provides a federal standard with which vehicular pursuits must comport, neither that provision nor the Fourteenth Amendment was intended to address the unintended consequences of this police practice. These matters, which involve important policy questions not only about police practices, but also about the availability of tort compensation and official immunities, should be left for the States and local governments to address.

1. Vehicular pursuits serve a vital function in law enforcement. According to the available data, many tens of thousands (between 50,000 and 500,000) vehicular pursuits occur each year. See Edmund F. Fennessy *et al.*, U.S. Dep't of Transp., A STUDY OF THE PROBLEM OF HOT PURSUIT BY THE POLICE 149

(1970). Not only do vehicular pursuits play a crucial role in the apprehension of criminal suspects, they also are essential in maintaining respect for the rule of law. Without vehicular pursuits, ordinary traffic laws could be disobeyed at will. And fleeing felons could easily elude capture by taking to the streets and outrunning the law in a "getaway" car.

The use of vehicular pursuits must be distinguished from the use of deadly force against a fleeing suspect, which was found by the Court to be per se unreasonable except where, "to prevent the escape of * * * felony suspects[,] * * * the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. Unlike the shooting of a gun, the use of a vehicle is a facet of living in today's society, and it facilitates law enforcement's efforts to apprehend suspects. And unlike the use of deadly force against a fleeing felon, vehicular pursuits are not "a self-defeating way of apprehending a suspect." *Id.* at 10.

To the limited extent that data on vehicular pursuits exist, it appears that the great majority end without injury and with the apprehension of the fleeing suspect. *See generally* Fennessy, *supra*, at 149-156. For instance, a 1983 California Highway Patrol study of freeway pursuits in California estimated that 89% ended without injury and 77% ended in apprehension; only 1% resulted in death. See Hugh Nugent *et al.*, National Institute of Justice, U.S. Dep't of Justice, RESTRICTIVE POLICIES FOR HIGH-SPEED POLICE PURSUITS 6-7 (citing Operational Planning Section, California Highway Patrol, PURSUIT STUDY (July 1983)).

Similarly, in Minnesota, nearly 75% of the vehicular pursuits conducted by law enforcement during 1989-1993 ended without accident. See Robert Crew *et al., Probabilities and Odds in Hot Pursuit: A Benefit-Cost Analysis*, 23 J. CRIM. JUST. 417, 419 tbl. 1 (1995). Moreover, an analysis of these pursuits concluded that the pursuits most likely to involve deaths were those initiated to apprehend fleeing felons or individuals suspected of driving while intoxicated. *Id.* at 422-423. The study concluded that "most [pursuits] are initiated for traffic offenses, most do not involve accidents, and most end in arrests." *Id.* at 419.

In Metro Dade County, Florida, which has the largest law enforcement department in the southeastern region of the United States, 323 vehicular pursuits were conducted in 1987, with 73% ending in arrests. See Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521, 527-528 (1989). A study of these pursuits reported three important findings. First, vehicular pursuits occurred "fewer than one * * * per twenty-four-hour day," which was lower than expected "[g]iven the number of police cars on the road, the number of miles driven by police in the metropolitan area under study, and the relatively high crime rate of the area." Geoffrey P. Alpert & Roger G. Dunham, POLICE PURSUIT DRIVING 58 (1990). Second, contrary to popular perception, "the vast majority of the pursuits taking place were of short duration and involved relatively slow speeds." *Id.* at 59. Third, and most important, the majority of pursuits ended without incident: 83% of the chases that occurred in the 1985-1987 period "resulted in *no* personal injury," and only a third resulted in an

accident, a number that represents "less than 5% of all the accidents involving police cars." *Ibid.* (emphasis in original). Moreover, the overwhelming number of injuries (87%) were minor, "involv[ing] only minor scratches, cuts, and bruises"; only 7% were serious and 1% resulted in death. *Id.* at 60. Significantly, more than 75% of the pursuits resulted in an arrest. Even though "a majority of the pursuits were initiated for relatively minor traffic infractions, many of those apprehended were charged with serious felony offenses unrelated to the pursuit (nearly 50%)." *Ibid.*

Undoubtedly, that some injuries and deaths do result from vehicular pursuits is a reason for public concern. But a myriad of considerations must go into determining the appropriate balance in this area. On the one hand, of course, there is an interest in compensating persons injured in the course of police pursuits. On the other hand, however, there is the danger that expansive liability will excessively inhibit police behavior and impose undue burdens on States and municipalities:

> Many units of local and county governments have had to bear the brunt of multi-million dollar judgments brought about by negligently performed high speed chases. Liability insurance for police patrols, which has always been expensive, has tripled or quadrupled in cost in recent years. For some jurisdictions, liability coverage has become virtually unobtainable. This means that many municipalities, townships and even some county governments, already struggling with the problem of funding essential public services from a diminishing revenue base, must now contend with the prospect of self-insuring

> the high-risk work activities of their law enforcement personnel.

Richard G. Zevitz, *Police Civil Liability and the Law of High Speed Pursuit*, 70 MARQ. L. REV. 237, 251-252 (1987) (footnotes omitted). Addressing this problem "involve[s] a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." *Collins*, 503 U.S. at 129.

Recognizing this reality, States have responded in an appropriate way. Many States now require law enforcement agencies to adopt official pursuit policies to regulate the use of high-speed vehicular pursuits by law enforcement officials. See, *e.g.*, WIS. STAT. § 346.03(6) (1997) ("Every law enforcement agency which uses authorized emergency vehicles shall provide written guidelines for its officers and employees regarding exceeding speed limits * * * when otherwise in pursuit of actual or suspected violators."). In addition, "[e]ven before pursuit guidelines were required, and in many places where there is still no such legal requirement, thousands of law enforcement agencies throughout the nation adopted official policies setting forth those circumstances under which high speed pursuit was permitted." Zevitz, *supra*, at 238. These pursuit guidelines all seek to ensure that vehicular pursuits are used to apprehend fleeing suspects "without undue risk to life or property." *Id.* at 239.[9] Moreover, in many States the officers who

[9] Congress is also considering the issue of vehicular pursuits. For instance, legislation has been proposed to require the establishment of pursuit policies and training by the States. NATIONAL POLICE PURSUIT POLICY ACT OF 1995, S. 923, 104th Cong. (1995).

engage in the pursuit may be held liable;[10] many States also provide that the municipality employing the officer may be held liable.[11] In other States, like California, the officer is accorded immunity, while the municipality may be held liable.[12]

---

[10] See, *e.g.*, *Estate of Aten* v. *City of Tucson*, 817 P.2d 951 (Ariz. 1991); *Zapp* v. *Kukuris*, 847 P.2d 150 (Colo. Ct. App. 1992); *Tetro* v. *Town of Stratford*, 458 A.2d 5 (Conn. 1983); *City of Pinellas Park* v. *Brown*, 604 So.2d 1222 (Fla. 1992); *Thompson* v. *Payne*, 453 S.E.2d 803 (Ga. Ct. App. 1995); *Currie* v. *Lao*, 592 N.E.2d 977, 982 (Ill. 1992); *Fiser* v. *City of Ann Arbor*, 339 N.W.2d 413 (Mich. 1983); *Oberkramer* v. *City of Ellisville*, 706 S.W.2d 440 (Mo. 1986); *Fiedler* v. *Stonack*, 661 A.2d 231 (N.J. 1995); *Baum* v. *Ohio State Highway Patrol*, 650 N.E.2d 1347 (Ohio 1995); *Lowrimore* v. *Dimmit*, 797 P.2d 1027 (Ore. 1990); *Haynes* v. *Hamilton County*, 883 S.W.2d 606 (Tenn. 1994); *City of Lancaster* v. *Chambers*, 883 S.W.2d 650 (Tex. 1994); *Morais* v. *Yee*, 648 A.2d 405 (Vt. 1994); *Colby* v. *Boyden*, 400 S.E.2d 184 (Va. 1991); *Mason* v. *Bitton*, 534 P.2d 1360 (Wash. 1975); *Peak* v. *Ratliff*, 408 S.E.2d 300 (W. Va. 1991); *Cavanaugh* v. *Andrade*, 550 N.W.2d 103 (Wis. 1996); *DeWald* v. *State*, 719 P.2d 643 (Wyo. 1986).

[11] See, *e.g.*, *Estate of Aten* v. *City of Tucson*, 817 P.2d 951 (Ariz. 1991); *Cline* v. *Rabson*, 856 P.2d 1 (Colo. Ct. App. 1992); *Fiser* v. *City of Ann Arbor*, 339 N.W.2d 413 (Mich. 1983); *Bittner* v. *City of St. Louis Police Bd. of Comm'rs*, 925 S.W.2d 495 (Mo. Ct. App. 1996); *Baum* v. *Ohio State Highway Patrol*, 650 N.E.2d 1347 (Ohio 1995); *Lowrimore* v. *Dimmit*, 797 P.2d 1027 (Ore. 1990); *Haynes* v. *Hamilton County*, 883 S.W.2d 606 (Tenn. 1994); *City of Lancaster* v. *Chambers*, 883 SW.2d 650 (Tex. 1994); *Mason* v. *Bitton*, 534 P.2d 1360 (Wash. 1975); *Cavanaugh* v. *Andrade*, 550 N.W.2d 103 (Wis. 1996); *DeWald* v. *State*, 719 P.2d 643 (Wyo. 1986).

[12] See, *e.g.*, *Thomas* v. *City of Richmond*, 892 P.2d 1185, 1189-1190 (Cal. 1995).

In these circumstances, federal courts should not substitute themselves for state and local decision-makers, thus pretermitting the workings of the political process. The kind of injury respondents allege is analogous to a state tort claim and, accordingly, should be left for state law to address.[13] "Regulation of the duties that state officials owe to various classes of citizens, and of the immunities to which state officials are entitled, is a traditional state prerogative * * *." Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 350 (1993). Holding a substantive due process violation to arise from an accidental injury, and making merely reckless conduct the source of a constitutional cause of action, "would displace traditional state authority" in this area and "thereby alter longstanding balances of power in the federal system." *Ibid.* That is not a path that the Court should follow.

---

[13] Tort law is well adapted to deal with the complexities likely to be found in cases of this sort. Under tort law, for example, recovery may be limited if the injured party was contributorily or comparatively negligent during the pursuit. See, *e.g.*, *Currie* v. *Lao*, 592 N.E.2d 977, 978 (Ill. 1992).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CHARLES ROTHFELD
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the *Amici Curiae*

August 8, 1997

Supreme Court, U.S.
FILED
AUG 8 1997
CLERK

No. 96-1337 (10)

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, AND JAMES EVERETT SMITH,

Petitioners,

v.

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of PHILIP LEWIS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, IOWA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH DAKOTA, PENNSYLVANIA, SOUTH DAKOTA, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN AND WYOMING IN SUPPORT OF PETITIONERS

DANIEL E. LUNGREN
Attorney General
MARGARET A. RODDA
Senior Assistant Attorney General
DARRYL L. DOKE
Supervising Deputy Attorney General
*STEPHEN J. EGAN
Deputy Attorney General
Counsel of Record for Amici States

1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916)324-5371
Additional Counsel Listed Inside
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

17 pp

ADDITIONAL COUNSEL

BRUCE M. BOTELHO
Attorney General
State of Alaska

GRANT WOODS
Attorney General
State of Arizona

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

THOMAS J. MILLER
Attorney General
State of Iowa

MICHAEL E. CARPENTER
Attorney General
State of Maine

SCOTT HARSHBARGER
Attorney General
State of Massachusetts

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

DENNIS C. VACCO
Attorney General
State of New York

HEIDI HEITKAMP
Attorney General
State of North Dakota

D. MICHAEL FISHER
Attorney General
State of Pennsylvania

MARK W. BARNETT
Attorney General
State of South Dakota

JAN GRAHAM
Attorney General
State of Utah

RICHARD CULLEN
Attorney General
State of Virginia

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

JAMES E. DOYLE
Attorney General
State of Wisconsin

WILLIAM U. HILL
Attorney General
State of Wyoming

QUESTIONS PRESENTED

1. Is the standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment in a police vehicular pursuit case brought pursuant to 42 U.S.C. § 1983, conduct that "shocks the conscience" or is it conduct "deliberately indifferent" to or "in reckless disregard" of the rights of a person injured in the course of the pursuit?

2. Is the law governing police pursuit cases "clearly established" so that officers engaged in such pursuits must be denied the protection of qualified good faith immunity from liability to a person injured in the course of the pursuit?

TABLE OF CONTENTS

Page

INTEREST OF AMICI STATES 1

SUMMARY OF ARGUMENT 2

ARGUMENT I.

THE TEST TO DETERMINE WHETHER A PEACE OFFICER HAS COMMITTED A FOURTEENTH AMENDMENT DUE PROCESS VIOLATION IN ENGAGING IN A VEHICULAR PURSUIT IS WHETHER THE CONDUCT OF THE OFFICER "SHOCKS THE CONSCIENCE" OF THE COURT .. 3

ARGUMENT II.

THE DOCTRINE OF QUALIFIED IMMUNITY PROTECTS PUBLIC OFFICIALS WHEN, AS HERE, THE COURTS ARE DIVIDED OVER THE STANDARD GOVERNING THEIR CONDUCT 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 7

Baker v. McCollan, 443 U.S. 137 (1979) 4

Cannon v. Taylor, 782 F.2d 947 (11th Cir. 1986) 8

Checki v. Webb, 785 F.2d 534 (5th Cir. 1986) 8

Collins v. City of Harker Heights, 505 U.S. 115 (1992) 3

Davis v. Scherer, 468 U.S. 183 (1984) 6, 7

Donovan v. City of Milwaukee, 17 F.3d 944 (7th Cir. 1994) 9

Elder v. Holloway, 510 U.S. 510 (1994) 6

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996) 8

Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994) 5, 6, 8

Galas v. McKee, 801 F.2d 200 (6th Cir. 1986) 8

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 6

Hunter v. Bryant, 503 U.S. 224 (1991) 7

Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987) 8

Lewis v. Sacramento County, 98 F.3d 444 (9th Cir. 1996) 2, 5

Malley v. Briggs, 475 U.S. 335 (1986) 7

Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992) 8

Paul v. Davis, 424 U.S. 693 (1976) 4

Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) 4

TABLE OF AUTHORITIES – Continued

Page

Roach v. City of Fredericktown, 882 F.2d 294 (8th Cir. 1989) 8

Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) 8

STATUTES

Civil Rights Act, Title 42 United States Code section 1983 ..... 2, 6

INTEREST OF AMICI STATES

Amici are States responsible for patrolling the highways of this Nation and enforcing the laws that pertain to the safe lawful operation of motor vehicles. Additionally, the States are charged with the responsibilities of crime prevention, effective law enforcement, and public safety. If affirmed, the decision of the Ninth Circuit Court of Appeals in this case will cripple apprehension of those who violate the law and attempt to evade arrest. The Amici States therefore have a significant interest in the outcome of this case.

The rule adopted below will force law enforcement agencies to decide whether they can *afford* to enforce the law through vehicular pursuits for virtually every pursuit which results in injury will lead to the filing of a civil rights action. Such suits will cost millions to defend and law enforcement entities will have to choose between settling these actions or risking costly awards of damages, attorney fees and potential awards of punitive damages against their officers. The public will be forced to accept a very substantial increase in the cost of crime prevention and criminal apprehension. If the public neglects to provide the funds, law enforcement agencies may be compelled to significantly curb or abandon vehicle pursuits altogether. As this fact becomes common knowledge, criminals will flee knowing it is unlikely that they will be pursued. The interest of the public in effective law enforcement will unquestionably suffer.

SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit erred in concluding that an officer engaged in a high speed vehicular pursuit can be held liable under the Civil Rights Act, 42 U.S.C. § 1983, if that officer's conduct was "deliberately indifferent to or in reckless disregard of" the substantive due process rights of a person injured as a result of the pursuit. This Court has established that an additional element is required; the conduct must "shock the conscience." The standard adopted by the Ninth Circuit is inconsistent with the precedent set by this Court. The standard of "deliberate indifference to or reckless disregard of" the safety of an injured person would essentially federalize state tort claims and open the floodgates of litigation; a result this Court has taken great pains to avoid.

The Ninth Circuit also erred in concluding that qualified immunity does not protect the individual officer from liability in cases such as *Lewis*. A police officer is entitled to the protection of qualified immunity when the standard which governs his conduct is uncertain. The law governing the standard of conduct which will give rise to civil rights liability in cases arising from vehicular pursuits was not clearly established at the time of the incident which forms the basis for the *Lewis* claim. Accordingly, the Ninth Circuit erred in denying immunity.

ARGUMENT

I.

THE TEST TO DETERMINE WHETHER A PEACE OFFICER HAS COMMITTED A FOURTEENTH AMENDMENT DUE PROCESS VIOLATION IN ENGAGING IN A VEHICULAR PURSUIT IS WHETHER THE CONDUCT OF THE OFFICER "SHOCKS THE CONSCIENCE" OF THE COURT.

In *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), this Court held that the appropriate standard to determine a Fourteenth Amendment due process violation is conduct which "shocks the conscience". In *Collins*, the wife of a city sanitation worker asphyxiated during the course of his duties claimed that her husband's substantive due process rights were violated by the city's alleged custom and policy of deliberate indifference to the safety of its employees. The Court expressed its concern with any expansion of the concept of substantive due process, and stated that a necessary element to a plaintiff's claim is that the "deliberate indifference of the City to Collins' safety be arbitrary government action that 'shock[s] the conscience' of federal judges". *Id.*, at 126. The Court reiterated this requirement when it ultimately concluded the conduct of the city did not violate substantive due process because the city's conduct could not be characterized as conscience shocking. *Id.*, at 128. The Court viewed plaintiff's claim as a typical state tort claim. It reiterated its well established rejection of the notion that the Due Process Clause should be interpreted to create federal duties of care analogous to tort law. *Id.*

The Ninth Circuit erroneously failed to follow *Collins*, instead holding: "We believe that the appropriate

degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security." Because the Court applied the incorrect standard, the decision below should be reversed.

Amici States submit that not only is the "shocks the conscience" standard the rule of this Court, but it is the better rule because it strikes the appropriate balance between competing concerns. The standard provides a floor that protects all individuals from severe government abuse, and permits states through their tort law to decide when a law enforcement officer should be held liable in police pursuit cases.

The standard adopted by the Ninth Circuit would turn a large number of state tort claims into federal civil rights actions. This Court has taken great pains to avoid and has repeatedly cautioned against making the Fourteenth Amendment a font of tort law. *Paul v. Davis*, 424 U.S. 693, 701 (1976). To this end, the Court has previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. *Baker v. McCollan*, 443 U.S. 137, 146 (1979). The reason for the reluctance of the court to expand the scope of the Due Process Clause is that guideposts for responsible decision making in this unchartered area are scarce and open-ended. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985). Thus, the Court has followed a policy of judicial self-restraint and has exercised the utmost care when requested to break new ground in this area. *Id.*

The decision of the Ninth Circuit in *Lewis* does precisely what this court has sought to avoid, and should not be permitted to stand. The confusion and potential negative results generated by the decision of the Ninth Circuit in the *Lewis* case must be reversed.

The selection of a standard of conduct is not mere semantics; it is often outcome-determinative. The Ninth Circuit below was therefore wrong in referring to the different standards as mere labels. See Pet. App. 13, 14 n.5 (The "circuits have applied various labels to the standard of conduct that may lead to liability"; "the labels the courts have applied to official conduct constituting a § 1983 violation range across a spectrum").

If the issue were merely one of labels as the Ninth Circuit suggests, one would expect the same result in cases involving very similar conduct. This is not the case. In cases in which the "shock the conscience" standard has been applied, the courts have found no due process violation; in cases in which the courts have applied the "deliberate indifference" or "reckless disregard" standard, a claim has been found to exist.

For instance, the facts in the *Lewis* case and *Fagan v. City of Vineland*, 22 F.3d 1298 (3d Cir. 1994), are quite similar. Both cases involved pursuit of teenagers. Both pursuits were initiated for relatively minor transgressions. Both pursuits reached speeds in excess of 60 miles per hour. In *Lewis*, the Ninth Circuit concluded that a standard of deliberate indifference or reckless disregard applied and that therefore an issue of fact existed and summary judgment should not have been granted by the trial court. *Lewis v. Sacramento County*, 98 F.3d at 444. By

contrast, in *Fagan*, the Third Circuit applied the "shocks the conscience" standard and concluded that a genuine issue of fact was not present and summary judgment was appropriate. *Fagan v. City of Vineland*, 22 F.3d at 1308-1309.

The difference between the standards is significant for officers in the field whose split second judgments are being judged in the reflective quiet of the courtroom. Officers ought not be held liable unless it can be said that their conduct is so reprehensible as to shock the conscience of judges and the citizenry.

II.

THE DOCTRINE OF QUALIFIED IMMUNITY PROTECTS PUBLIC OFFICIALS WHEN, AS HERE, THE COURTS ARE DIVIDED OVER THE STANDARD GOVERNING THEIR CONDUCT.

For purposes of qualified immunity under 42 U.S.C. § 1983, the threshold question is whether the conduct complained of violated law clearly established at the time of the incident. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Review of this issue must be conducted in light of all relevant precedent. *Elder v. Holloway*, 510 U.S. 510 (1994).

As articulated by this Court in *Davis v. Scherer*, 468 U.S. 183 (1984), the necessity for "clear establishment" of the law is of vital importance for protecting public officials, in that:

> "[t]he qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated . . . "
>
> "Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them . . . In these circumstances, officials should not err always on the side of caution."

Even if a governmental defendant violates another's constitutional rights, qualified immunity protects the defendant so long as the conduct of the defendant was not unreasonable. *Davis v. Scherer*, 468 U.S. 183, 190 (1984). The test for reasonable conduct is whether the reasonable officer would have believed the action in question to be lawful, in light of clearly established law and the information possessed by the officer. *Hunter v. Bryant*, 503 U.S. 224, 227 (1991). In sum, the qualified immunity defense provides protection to all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In order for a law to be clearly established for purposes of qualified immunity, it must have earlier been developed in such a concrete and factually defined context to make it obvious to any reasonable government actor that what he is doing violates federal law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Ninth Circuit erred in finding the law on high speed pursuits was clearly established at the time of the

accident giving rise to this action. There was no consistency among the courts as to the standard of conduct necessary to establish a civil rights claim in the context of a high speed police pursuit. See *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989); *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987); *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986); *Cannon v. Taylor*, 782 F.2d 947 (11th 1986); *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986).

Not only was the law unsettled in 1990 when the events in issue occurred, but the uncertainty continues today. The various circuit courts of appeal are clearly divided on the issue of the standard of conduct. The First Circuit [*Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996)], Third Circuit [*Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994)], and Fourth Circuit [*Temkin v. Frederick County Comm'rs*, 945 F.2d 716 (4th Cir. 1991)] have held the standard to be conduct which "shocks the conscience." The Tenth Circuit [*Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992)] and Eighth Circuit [*Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989)] have adopted lesser standards such as "deliberate indifference" or "gross negligence."

This conflict clearly indicates that the law is still developing and that the law was not clearly established at the time of the incident giving rise to this action. The cases taken as a whole do not serve as a bright-line rule to police officers patrolling the highways, nor can it be said that the law is so concrete that any reasonable officer would understand when pursuit of a fleeing suspect will constitute a violation of the Civil Rights Act. Likewise it cannot be said that the state of the law is such that the law "compels" the same conclusion for all like-situated

reasonable officers. See *Donovan v. City of Milwaukee*, 17 F.3d 944, 953 (7th Cir. 1994) in which the Seventh Circuit noted that where only two other circuits had considered cases on point and a split existed between them, the relevant case law was still developing and the law was not "clearly established."

Amici States respectfully submit that a peace officer should be immune from liability under the Civil Rights Act for injuries which occur in the course of a high speed chase until this Court sets forth, or the lower courts have agreed upon, the standard of conduct, have established the factors which should be considered in evaluating the conduct of the officer, and have provided some guidance as to the factual scenarios giving rise to liability.

CONCLUSION

Based on the foregoing, Amici States respectfully request that the Court reverse the Ninth Circuit decision in this case. Additionally, Amici States ask that the Court hold that the standard of conduct necessary to establish a Fourteenth Amendment due process violation is conduct which "shocks the conscience." Amici further request that the Court find that the officer sued in this action is protected by qualified immunity since the law governing

his conduct was unsettled on the day of the events giving rise to this action.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

MARGARET A. RODDA
Senior Assistant Attorney General
DARRYL L. DOKE
Supervising Deputy Attorney General

*STEPHEN J. EGAN
Deputy Attorney General

*Counsel of Record

Counsel for Amici States

ADDITIONAL COUNSEL

BRUCE M. BOTELHO
Attorney General
State of Alaska

GRANT WOODS
Attorney General
State of Arizona

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

THOMAS J. MILLER
Attorney General
State of Iowa

MICHAEL E. CARPENTER
Attorney General
State of Maine

SCOTT HARSHBARGER
Attorney General
State of Massachusetts

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

DENNIS C. VACCO
Attorney General
State of New York

HEIDI HEITKAMP
Attorney General
State of North Dakota

D. MICHAEL FISHER
Attorney General
State of Pennsylvania

MARK W. BARNETT
Attorney General
State of South Dakota

JAN GRAHAM
Attorney General
State of Utah

RICHARD CULLEN
Attorney General
State of Virginia

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

JAMES E. DOYLE
Attorney General
State of Wisconsin

WILLIAM U. HILL
Attorney General
State of Wyoming

...TION FILED
AUG 8 1997

(11)

No. 96-1337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,
Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of Philip Lewis,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

36 pp

QUESTION PRESENTED

Does a plaintiff state a cause of action for an allegedly wrongful death, under 42 U. S. C. § 1983 and "substantive due process," when the injury causing death was accidental and state remedies are adequate?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,
Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of Philip Lewis,
Respondents.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITIONERS

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioners. Counsel for petitioners has consented, but counsel for respondents has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to the detection and capture of criminals, the rapid, efficient and reliable determination of guilt, and the swift execution of punishment.

In this case, plaintiffs seek to constitutionalize the question of a civil liability for police pursuits without a seizure. If they succeed, they will disrupt the tort system already in place for these kinds of claims, increase liability and litigation costs for local governments, and cause police to forego pursuits which should be made. As a result, many dangerous felons will escape, and the financial ability of local governments to protect their citizens will be impaired. These results would be contrary to the purposes for which CJLF was formed, and CJLF therefore has an interest in the case.

For the foregoing reasons, *amicus* requests leave to file its brief.

August, 1997

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

Question presented i

Motion for leave to file iii

Interest of *amicus curiae* iii

Table of authorities vii

Brief *amicus curiae* 1

Summary of facts and case 1

Summary of argument 3

Argument 5

I

"Substantive due process" risks violating the constitutional right of self-government and should not be further expanded 5

II

Police pursuit involves competing costs and benefits better weighed by other branches of government 8

A. Costs and benefits of police pursuit 8

B. The jury as policymaker 11

III

The California Legislature has considered this issue and struck an appropriate balance 13

IV

Substantive due process claims should be limited to intentional deprivations 15

A. Mental state, section 1983, and vicarious liability 16

B. Fourth and Eighth Amendment claims 17

C. Fuzzy standards and zones of conduct 19

V

The rule of *Parratt* v. *Taylor* should apply to all due process claims, whether procedural or substantive 21

Conclusion 25

TABLE OF AUTHORITIES

Cases

Adkins v. Children's Hospital, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct. 39 (1923) 7

Albright v. Oliver, 510 U. S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) 5, 7, 18, 20, 21, 22, 25

Berman v. City of Daly City, 21 Cal. App. 4th 276, 26 Cal. Rptr. 2d 493 (1993) 14

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 386, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971) 17

BMW of North America, Inc. v. Gore, 517 U. S. ___, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996) 12

Brower v. Inyo County, 489 U. S. 593, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989) 18, 20

Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461 (1936) 23

Brummett v. County of Sacramento, 21 Cal. 3d 880, 148 Cal. Rptr. 361, 582 P. 2d 952 (1978) 13

Canton v. Harris, 489 U. S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989) 16

City of Boerne v. Flores, 521 U. S. ___, 65 U. S. L. W. 4612 (June 26, 1997) 6

Collins v. Harker Heights, 503 U. S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992) 5, 17, 25

Compassion in Dying v. Washington, 79 F. 3d 790, (CA9 1996) 7

Daniels v. Williams, 474 U. S. 327, 88 L. Ed. 2d 662,
106 S. Ct. 662 (1986) 15, 16, 20, 24

DeShaney v. Winnebago County Dept. of Social Services,
489 U. S. 189, 103 L. Ed. 2d 249,
109 S. Ct. 998 (1989) 12, 24

Dred Scott v. Sandford, 19 How. (60 U. S.) 393,
15 L. Ed. 691 (1857) 7

Estelle v. Gamble, 429 U. S. 97, 50 L. Ed. 2d 251,
97 S. Ct. 285 (1976) 18

Farmer v. Brennan, 511 U. S. 825, 128 L. Ed. 2d 811,
114 S. Ct. 1970 (1994) 18

Fuentes v. Shevin, 407 U. S. 67, 32 L. Ed. 2d 556,
92 S. Ct. 1983 (1972) 22

Graham v. Connor, 490 U. S. 386, 104 L. Ed. 2d 443,
109 S. Ct. 1865 (1989) 16, 17, 20

Hudson v. McMillian, 503 U. S. 1, 117 L. Ed. 2d 156,
112 S. Ct. 995 (1992) 18

Hudson v. Palmer, 468 U. S. 517, 82 L. Ed. 2d 393,
104 S. Ct. 3194 (1984) 22

Johnson v. Glick, 481 F. 2d 1028 (CA2 1973) 18

Lewis v. Sacramento County, 98 F. 3d 434
(CA9 1996) 1, 2, 3

Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937,
25 S. Ct. 539 (1905) 7

Los Angeles v. Heller, 475 U. S. 796, 89 L. Ed. 2d 806,
106 S. Ct. 1571 (1986) 17

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 (1961) 23

Mary M. v. City of Los Angeles, 54 Cal. 3d 202,
285 Cal. Rptr. 99, 814 P. 2d 1341 (1991) 13

Monell v. New York City Dept. of Social Services,
436 U. S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) 16

Monroe v. Pape, 365 U. S. 167, 5 L. Ed. 2d 492,
81 S. Ct. 473 (1961) 16

Parratt v. Taylor, 451 U. S. 527, 68 L. Ed. 2d 420,
101 S. Ct. 1908 (1981) 7, 15, 20, 21, 22

People v. Rochin, 101 Cal. App. 2d 140,
225 P. 2d 1 (1950) 23

Poe v. Ullman, 367 U. S. 497, 6 L. Ed. 2d 989,
81 S. Ct. 1752 (1961) 15, 22, 24

Richardson v. McKnight, 521 U. S. ___,
65 U. S. L. W. 4579 (June 23, 1997) 14

Rochin v. California, 342 U. S. 165, 96 L. Ed. 183,
72 S. Ct. 205 (1952) 23

Temkin v. Frederick County Com'rs, 945 F. 2d 716,
(CA4 1991) 19

Tennessee v. Garner, 471 U. S. 1, 85 L. Ed. 2d 1,
105 S. Ct. 1694 (1985) 17

Thomas v. City of Richmond, 9 Cal. 4th 1154,
40 Cal. Rptr. 2d 442, 892 P. 2d 1185 (1995) 13

United States v. Carolene Products Co., 304 U. S. 144,
82 L. Ed. 1234, 58 S. Ct. 778 (1938) 12

Washington v. Glucksberg, 521 U. S. ___,
65 U. S. L. W. 4669 (June 26, 1997) 5, 7, 22

Webster v. Fall, 266 U. S. 507, 69 L. Ed. 411,
45 S. Ct. 148 (1925) 24

Whitley v. Albers, 475 U. S. 312, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986) 18, 19

Wolf v. Colorado, 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949) 23

Youngberg v. Romeo, 457 U. S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982) 23, 24

United States Constitution

U. S. Const., Amdt. 10 6

U. S. Const., Amdt. 14, § 1 24

U. S. Const., Art. I, § 2, cl. 1 5

U. S. Const., Art. I, § 8 5

State Constitution

Cal. Const., Art. IV, § 1 14

State Statutes

Cal. Civ. Code § 1431.1 14

Cal. Civ. Code § 1431.2 14

Cal. Govt. Code § 815.2 13

Cal. Veh. Code § 17001 13

Cal. Veh. Code § 17004 13

Cal. Veh. Code § 17004.7 14

Cal. Veh. Code § 2800.1 2

Cal. Veh. Code § 2800.2 ..... 2, 10

Treatise

5 B. Witkin, Summary of California Law (9th ed. 1988) 13, 22

Miscellaneous

Alpert & Dunham, Policing Hot Pursuits: The Discovery of Aleatory Elements, 80 J. Crim. L. & Criminology 521 (1989) 9, 10

California Highway Patrol, Pursuit Study (1983) ... 8, 9, 11

California Highway Patrol, The Evaluation of Risk: Initial Cause v. Final Outcome in Police Pursuits (1995) ... 9, 10

The Federalist No. 78 (C. Rossiter ed. 1961) (A. Hamilton) 7

Sweeney, Vehicular Pursuit: A Serious—and Ongoing —Problem, 63 The Police Chief 16 (Jan. 1997) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,
Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of Philip Lewis,
Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

SUMMARY OF FACTS AND CASE

The present case came to the Court of Appeals on summary judgment, and that court therefore presumed the facts in the light most favorable to the plaintiffs.[1] *Lewis* v. *Sacramento County*, 98 F. 3d 434, 436 (CA9 1996). The presumed facts as stated in the opinion may be briefly summarized as follows.

Defendant James Smith, a sheriff's deputy employed by defendant County of Sacramento, responded to a call to break up a fight. *Ibid.* Officer Stapp responded to the same call. After handling the call, both officers returned to their cars. Deputy Smith saw Officer Stapp's lights come on, heard him yell something at two boys on a motorcycle, and saw him

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

maneuver his car in an unsuccessful attempt to stop the motorcycle from leaving.

The motorcycle was driven by Brian Willard. The decedent, Philip Lewis, was a passenger. Willard evaded Stapp's attempt to detain him and accelerated away. *Ibid.* This would appear to be a misdemeanor violation of California Vehicle Code § 2800.1(a).[2]

Deputy Smith pursued Willard.

> "The pursuit lasted about seventy-five seconds and covered approximately 1.3 miles. Posted speed limits were as low as 30 miles per hour. The average speed of the vehicles was calculated to be 60 miles per hour with high speeds of up to 100 miles per hour. The pursuit went through four stop lights and three ninety degree turns." 98 F. 3d., at 436.

In other words, Willard committed a violation of California Vehicle Code § 2800.2, a felony.[3] Neither the Court of Appeals' opinion nor the Brief in Opposition indicates any justification whatever for Willard's actions.

Willard "went over a crest in the road, attempted to make a hard left turn, and skidded to a halt." 98 F. 3d, at 437. Deputy Smith came over the hill and was unable to stop in time. His car hit Philip Lewis, who died at the scene. Willard was not injured significantly. *Ibid.*

Lewis' parents sued Sacramento County, the Sheriff's Department, and Deputy Smith. Brian Willard, the perpetrator of the felony which resulted in Philip Lewis' death, is not named as defendant in this action. Plaintiffs filed in state court,

2. That section prohibits fleeing if a distinctively marked vehicle, operated by a peace officer, has its red lights on and sounds a siren "as may reasonably be necessary." Under these circumstances, the siren appears not to have been necessary.

3. More precisely, this offense is punishable by either felony punishment (state prison) or misdemeanor punishment (county jail or fine) in the discretion of the court. *Ibid.* This type of offense is known colloquially as a "wobbler."

claim under 42 U. S. C. § 1983. Defendants removed the case to federal court and moved for summary judgment. *Ibid.*

The district court granted summary judgment for defendants on all federal questions and dismissed the pendent state law claims without prejudice. *Ibid.* The Court of Appeals reversed as to Deputy Smith. The court held that "deliberate indifference" was the standard for pursuit cases. *Id.*, at 441. The court also concluded that Deputy Smith was not entitled to qualified immunity. *Id.*, at 445.[4]

SUMMARY OF ARGUMENT

The parties in this case differ primarily over what standard should apply to an unintended deprivation of life or liberty in a "substantive due process" case. There is, however, an antecedent question of whether "substantive due process" applies to such deprivations *at all*. Further, there is the question of whether the rule of *Parratt* v. *Taylor* can be evaded simply by relabeling a due process claim as "substantive" rather than "procedural."

Of all doctrines of constitutional law, substantive due process carries the greatest danger to the people's constitutional right of self-government. Its lack of either guideposts or inherent boundaries make it a vehicle of potentially enormous breadth for the judiciary to override the popular will with the policy preferences of its members.

Police pursuit has costs and benefits. Weighing these against each other is a task better suited to other branches of government. Pursuits do result in some accidents and a few deaths, but they also result in the capture of a large number of felons, even though the felony status of the pursued person may not be apparent at the time the pursuit is begun. Furthermore,

---

4. *Amicus* will not address the immunity issue in this brief. The error in the decision below is patent, see Pet. for Cert. 23-27, and it warrants reversal on straightforward application of existing precedents.

the cost of a highly restrictive pursuit policy would be a license to escape merely by driving recklessly. If pursuit policy is to be driven by fear of lawsuits, that policy will be weighted toward minimizing risks for which the agency can be sued, such as pursuits, while exposing the public to greater risks for which it cannot, such as the felons and intoxicated drivers who would otherwise have been caught.

The people and Legislature of California have already weighed the competing interests and struck a reasonable balance. California law provides immunity for the individual officer and a tort action, with some limitations, against government entities for negligent operation of vehicles by their employees. Creation of a federal tort for automobile accidents would shatter the balance achieved through the democratic process.

Substantive due process does not have the inherent boundaries of Fourth and Eighth Amendment claims. That is, it is not limited to seizures or to convicted persons. A vague standard is therefore far more dangerous in this area than in the others. Such a standard would chill the legitimate exercise of lawful police powers in the vitally important area of public safety. This problem is best avoided by limiting substantive due process claims to intentional deprivations.

Most substantive due process claims challenge a choice of substantive law made by the legislative authority. In that context, the availability of state judicial process cannot negate a violation. In the context of a "constitutional tort" suit, however, state processes can and should be a factor in the equation. When the state provides an adequate postdeprivation remedy, as California has in the present case, it has provided the process due, and there is no constitutional violation.

ARGUMENT

I. "Substantive due process" risks violating the constitutional right of self-government and should not be further expanded.

Plaintiffs in this case seek to expand the concept of "substantive due process" into a new field of law, one which had previously been governed by statute and common law. This argument bears a heavy burden, as this Court recently explained in *Washington* v. *Glucksberg*, 521 U. S. ___, 65 U. S. L. W. 4669, 4674 (June 26, 1997).

> "But we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' *Collins* [v. *Harker Heights*], 503 U. S. [115], 125 [1992]. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' *ibid.*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, [Citation]."

"Reluctant" may be an understatement. Substantive due process is a treacherous field. See *Albright* v. *Oliver*, 510 U. S. 266, 281 (1994) (Ginsburg, J., concurring). The reason why it is treacherous goes to the very heart of the Constitution.

The Constitution contains three basic kinds of provisions. Structural provisions set up the various organs of government and specify how their members are chosen. See, *e.g.*, U. S. Const., Art. I, § 2, cl. 1 (election of Representatives). Some provisions establish rules of law, placing these rules outside of the legislative power. The Bill of Rights and section 1 of each of the Civil War amendments are the most important of these. Finally, other provisions allocate power among the various branches and levels of government. Article I, section 8 sets

forth the federal legislative power, and the Tenth Amendment confirms that all powers not otherwise assigned or prohibited are reserved to the states and the people.

Whenever a court is asked to broadly interpret the substantive rules provisions of the Constitution, it runs the risk of violating the allocation of power provisions. If the Constitution says that Question X is a matter of state law, and a court declares it to be a matter of federal constitutional law, then the court has violated the constitutional right of the people of each state to decide Question X for themselves through the democratic process. Such a violation is every bit as grave as a legislature's or executive officer's violation of the Bill of Rights.

City of Boerne v. *Flores*, 521 U. S. ___, 65 U. S. L. W. 4612 (June 26, 1997) illustrates how the Constitution can be violated in the name of enforcing it. By expanding the right of free exercise of religion, Congress attempted to diminish the constitutional right of the people of the states and localities to decide for themselves those questions which are neither decided by the Constitution nor assigned to the federal government. "Congress does not enforce a constitutional right by changing what the right is." *Id.*, at 4615. Such a power would upset the federal balance. See *id.*, at 4620.

The federal balance is equally threatened by expansive judicial interpretations of the Constitution's substantive provisions. While the legislative branch can violate the separation of powers by intruding upon the judicial power to interpret the Constitution, see *ibid.*, the judiciary commits an equal violation when it misuses the interpretative power to usurp for itself a decision which the Constitution actually assigns to the democratic process.

Of all constitutional doctrines, "substantive due process" presents the greatest danger of judicial overreaching. Some of the darkest days in American judicial history have involved the misuse of that doctrine by courts to "substitute their own pleasure to the constitutional intentions of the legislature." See

The Federalist No. 78, pp. 468-469 (C. Rossiter ed. 1961) (A. Hamilton). *Dred Scott* v. *Sandford*, 19 How. 393 (1857) found in the Due Process Clause a constitutional right to own slaves in a territory where Congress had abolished slavery. See *id.*, at 450-451. *Lochner* v. *New York*, 198 U. S. 45, 53, 57 (1905) found a constitutional right to liberty of contract that overrode a statutory maximum on working hours. *Adkins* v. *Children's Hospital*, 261 U. S. 525, 559 (1923) struck down a minimum wage law. See *Washington* v. *Glucksberg*, *supra*, 65 U. S. L. W., at 4685-4686 (Souter, J., concurring in the judgment).

These cases are, of course, "now condemned with virtual unanimity as disastrous mistakes of substantive due process review." *Id.*, at 14. But they are more than that. The ghosts of these discredited decisions stand as a warning against the temptation to sweep all important decisions into the judicial power, leaving only minor questions to the democratic process. See *Compassion in Dying* v. *Washington*, 79 F. 3d 790, 858 (CA9 1996) (Kleinfeld, J., dissenting), rev'd in *Glucksberg*, *supra*.

The traditional reluctance to expand substantive due process should be applied in the present case. *Amicus* submits that the time has come to address the position taken by Justice Powell in *Parratt* v. *Taylor*, 451 U. S. 527, 548-549 (1981) (opinion concurring in the judgment). Substantive due process claims should be limited to intentional deprivations. Alternatively, much the same result can be achieved through the approach of Justice Kennedy's concurrence in *Albright*, *supra*, 510 U. S., at 285. "Substantive due process" includes postdeprivation remedies, and where the state provides them for an unauthorized act it has provided the process due.

II. Police pursuit involves competing costs and benefits better weighed by other branches of government.

A. Costs and Benefits of Police Pursuit.

When a suspect in a vehicle flees from a police officer attempting to make a valid stop, the officer is faced with a choice between letting the suspect escape or incurring the risks of the chase. That choice is a form of cost-benefit analysis. Under what circumstances do the benefits of conducting the chase outweigh the cost of incurring the risks? The immediate question before this Court is whether this cost-benefit analysis should be constitutionalized and taken over by the federal judiciary or whether it should remain where it has traditionally resided—with elected policymakers responsible to the people.

The pros and cons of pursuit under various circumstances have been vigorously debated and will continue to be debated. *Amicus* CJLF does not propose any definite answers to this debate in this brief. Our point is that the issues are close enough and complex enough that police pursuit policies should be established by the elected branches and not by federal judges or juries.

The popular image of the "high-speed chase" comes primarily from Hollywood. These ubiquitous "action scenes" bear little resemblance to reality. See California Highway Patrol, Pursuit Study 4 (1983) (cited below as "CHP Study"). Other, more serious, statements about police pursuit have also been disconnected from reality. A widely cited 1968 publication by a group called Physicians for Automotive Safety claimed that one in five pursuits ended in death. This "study" was based on reading newspaper clippings, creating an obvious and extreme sampling bias. See CHP Study, at 8-9. Chases resulting in death are far more likely to be reported in the press than chases that terminate with neither injury nor property damage.

From April through September of 1982, the California Highway Patrol collected data from its own officers and from

ten local law enforcement agencies in a variety of jurisdictions.[4] There were seven fatalities in 683 pursuits. See *id.*, at 22-23. That is one percent, one-twentieth of the rate claimed by the Physicians for Automotive Safety. Other studies yield similar results. Alpert & Dunham, Policing Hot Pursuits: The Discovery of Aleatory Elements, 80 J. Crim. L. & Criminology 521 (1989), report on the results of a 1987 study in Dade County, Florida. This study included 323 pursuits. *Id.*, at 527. There were three fatalities, all of them suspects, a rate of less than one percent. *Id.*, at 528. There were 75 injuries, but 87% of those were minor. *Ibid.*

The benefits of pursuit, or conversely the costs of a no-pursuit policy, are quite substantial. Statewide California data for 1994 indicate that 70% of pursuits are begun for infractions or misdemeanors. California Highway Patrol, The Evaluation of Risk: Initial Cause v. Final Outcome in Police Pursuits 8 (1995). Yet 73% of successful pursuits end in a felony arrest. *Id.*, at 9. Unfortunately, the data reporting system does not fully disclose how many of those felony arrests include a felony other than the felony of evading an officer. See *id.*, at 25. An informal CHP survey examined 2,601 pursuits beginning with an infraction and ending with a felony arrest. See *id.*, at 22. The results, see *id.*, at 23, are as follows:

4. Participating agencies included San Francisco, Merced (a small city in an agricultural area), and a variety of areas in between. CHP Study, at 10.

Felony evading only	511	19.6%	
Felony evading & misdemeanor	74	2.8%	
Felony evading & "wanted"	17	0.7%	
Felony evading & another felony	356	13.7%	} 76.9%
Total felony evading	958		
Other felonies only	1,643[5]	63.2%	
Total	2,601		

Thus, the criticism that the large percentage charged with felonies is the result primarily of the pursuits themselves is not valid. Over three-quarters of pursuits begun for infractions and ending in felony arrests include a felony charge other than evading. This result is consistent with the Alpert and Dunham study. "While a majority of the pursuits were initiated for relatively minor traffic infractions, many of those apprehended were charged with serious felony offenses unrelated to the pursuit (nearly 50%). This indicates that many offenders flee from the officer because of concern over more than the traffic offense that initiated the pursuit." Alpert & Dunham, 80 J. Crim. L. & Criminology, at 535.

A person who drives recklessly while evading an officer commits a serious offense, see Cal. Veh. Code § 2800.2, in addition to endangering himself and others. A person who would do that either fears arrest for another, more serious, offense or has so little regard for the law and for the safety of others that he would incur such risks on minimal provocation. Either way, the arrest of such a person is an important enhancement to public safety.

Just as important as the direct benefit of pursuit is the indirect benefit. If people know that they will be pursued, and probably caught, few will flee. Conversely, if a law enforce-

5. This number is implicit in the fact that all 2,601 were charged with felonies, see *id.*, at 22, and only 958 with felony evading.

ment agency prohibited pursuits, and if that policy were publicly known, it would amount to a license to evade arrest merely by driving recklessly. As the CHP noted in its 1983 study,

> "Attempted apprehension of motorists in violation of what appear to be minor traffic infractions is necessary for the preservation of order on the highways of California. If approximately 700 people will attempt to flee from the officers who participated in this six-month study, knowing full well that the officers would give chase, one can imagine what would happen if the police suddenly banned pursuits. Undoubtedly, innocent people may be injured or killed because an officer chooses to pursue a suspect, but this risk is necessary to avoid the even greater loss that would occur if law enforcement agencies were not allowed to aggressively pursue violators." CHP Study, at 21.

If only a tiny fraction of the millions of people stopped annually were to evade police as the result of a no-pursuit policy, the number of such evasions would be many times the present number of pursuits. They would be shorter, of course, because the offender need only drive at high speed until he is out of sight. But the average pursuit is already short, with most pursuits being less than five miles. See CHP Study, at 24. A much larger number of somewhat shorter reckless driving episodes would not necessarily be a net gain in public safety. It could very well be a net loss.

B. The Jury as Policymaker.

Absent a constitutional rule in this area, the elected branches of government can weigh the competing considerations in the light of growing knowledge and improving technology.[6] Legislatures can decide the criteria for compensating persons

6. Technology may eventually provide safer alternatives, such as electronic devices to disable a car's ignition. See Sweeney, Vehicular Pursuit: A Serious—and Ongoing—Problem, 63 The Police Chief 16, 18 (Jan. 1997).

injured in collisions resulting from pursuit. City councils and county boards can establish pursuit policies, or insure that their agencies do so. These decisions can be based on the total costs to society of these pursuits and on the total benefits from them.

On the other hand, if a constitutional rule is established by judicial fiat, avoiding liability is likely to become the driving force. Injuries and deaths for which the county can be sued will "count" more than equally serious accidents which cannot result in liability. If a no-pursuit policy permits a severely intoxicated driver to escape, and he kills someone miles down the road, the county is not liable. See *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189, 196-197 (1989) (no liability for failure to protect). If the same drunk killed someone during an attempt to stop him, there would be an arguable case for liability under the Ninth Circuit's rule in this case. Under such a regime, a cash-strapped county will be under strong pressure to forego the path of minimum danger in favor of the path of minimum liability. The paths may well be different.

The problem is exacerbated when liability is determined by juries instructed in vague terms. As this Court is well aware, juries sometimes hand down astonishing verdicts for conduct which the "tortfeasor" reasonably believed was entirely proper. See, *e.g.*, *BMW of North America, Inc.* v. *Gore*, 517 U. S. ___, 134 L. Ed. 2d 809, 828, 116 S. Ct. 1589, 1601 (1996). A jury is presented with a concrete case of a person actually injured or killed in a pursuit, while the other people who might have been injured or killed as a result of not pursuing are mere abstractions. It would be unrealistic to expect detachment, objectivity, and a balanced assessment of the risks apparent at the time the police acted. Yet that is the kind of decision-making that good policy formation requires.

The case for federal constitutional intrusion in this area would be stronger if pursuit policy were the result of "prejudice against discrete and insular minorities," see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938), without power in the political process. But injury to innocents

from police chases is a largely random event. Both the costs and the benefits are spread over the whole populace.[7] There is no reason to regard the democratic process with a suspicious eye on this issue.

III. The California Legislature has considered this issue and struck an appropriate balance.

Sovereign immunity, as a general rule, has been abolished in California. Absent a specific statute, California public entities are liable for the torts committed by employees acting within the scope of their employment. Cal. Govt. Code § 815.2(a); 5 B. Witkin, Summary of California Law § 150, p. 231 (9th ed. 1988). Scope of employment is broadly defined. It includes peace officers who misuse their authority. See *Mary M.* v. *Los Angeles*, 54 Cal. 3d 202, 221, 814 P. 2d 1341, 1352 (1991); 5 Witkin, *supra*, § 151, at pp. 70-74 (1996 Supp.).

For automobile accidents, the law is even more specific. "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of a public entity acting within the scope of his employment." Cal. Veh. Code § 17001. For emergency vehicles, the individual operator has immunity, Cal. Veh. Code § 17004, but the public employer remains liable. See *Brummett* v. *County of Sacramento*, 21 Cal. 3d 880, 885, 582 P. 2d 952, 955 (1978); *Thomas* v. *City of Richmond*, 9 Cal. 4th 1154, 1157-1158, 892 P. 2d 1185, 1186-1187 (1995); 5 Witkin, *supra*, § 231, at 316-317.

This latter immunity serves many of the same goals as this Court's qualified immunity jurisprudence. Victims of crime, fire, and other deadly dangers need emergency vehicles to

---

7. There is, of course, one group far more likely to be killed or injured in police chases: the perpetrators. But criminals are not a suspect classification, and in any event it would be ludicrous to suggest that a person suffers a constitutional deprivation from the natural consequence of his own voluntary, criminal act.

respond quickly. If the people who drive them are overly concerned with the devastating impact of personal liability, they may be excessively cautious and excessively slow in responding, even if such slowness means a substantial net loss of life. See *Richardson* v. *McKnight*, 521 U. S. ___, 65 U. S. L. W. 4579, 4582 (June 23, 1997) ("protecting the public from unwarranted timidity" as purpose of immunity doctrine). Public safety, on the whole, is better served by individual immunity, while compensation of those injured by negligent operation of emergency vehicles is better served by holding the entity liable in appropriate cases. Of course, an employee will have some concern about incurring liability to the employer, which may result in demotion or discharge, but that concern is less likely to cause hypercaution than is the spectre of devastating personal liability.

For pursuit cases, the California Legislature has refined the rule one step further. To encourage public entities to develop pursuit policies, the Legislature has provided immunity from liability for collisions with the *pursued* vehicle if the entity has adopted a policy that meets certain standards. Cal. Veh. Code § 17004.7. The Legislature has made a judgment that the adoption of these policies will result in an overall reduction in the frequency of accidents. See *Berman* v. *City of Daly City*, 21 Cal. App. 4th 276, 280-281, 26 Cal. Rptr. 2d 493, 495 (1993).

Finally, the people of California have decided, through direct exercise of their reserved legislative power, see Cal. Const., Art. IV, § 1, that when more than one person is responsible for an injury, liability for noneconomic damages should be several and not joint and proportionate to fault. Cal. Civ. Code § 1431.2. The people passed this initiative for the specific purpose of protecting the financial integrity of their local governments and the ability of those governments to provide essential services. Cal. Civ. Code § 1431.1. This value judgment is particularly applicable to police pursuit cases, since such cases will nearly always involve a tortfeasor more at fault than the police officer: the perpetrator.

Plaintiff in this case proposes, in effect, that the federal courts should take a machete to this tapestry. The Legislature's decision to provide clear immunity to the operators of emergency vehicles would be nullified and replaced with nebulous doctrines of qualified immunity and "willful disregard" liability. The incentive for public entities to adopt pursuit policies in exchange for immunity would be vastly reduced, as they would still have to litigate the new federal liability. The considered judgment of the people of California regarding joint and several liability for noneconomic damages would be nullified.

In the present case, California law provides two remedies for the plaintiffs. First and foremost, they have a clear cause of action for both compensatory and punitive damages against the *real* perpetrator in this case, the operator of the motorcycle, Brian Willard. His outrageous and inexcusable act deserves the most severe condemnation. Unlike the sheriff's deputy, who must weigh competing concerns in a very short time, Willard had absolutely no justification for his actions. Second, to the extent that they can show a public employee was negligent in his operation of a motor vehicle, California Vehicle Code section 17001 provides a remedy.

There is no "arbitrary imposition" or "purposeless restraint" at work here. Cf. *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting). The people of California, through the democratic process, have struck a reasonable balance among the difficult and weighty public policy issues in this area. The need for federal intervention is minimal, if any. The disruptive effect of such intervention would be substantial.

IV. Substantive due process claims should be limited to intentional deprivations.

In *Parratt* v. *Taylor*, 451 U. S. 527 (1981), overruled in part in *Daniels* v. *Williams*, 474 U. S. 327, 330-331 (1986), Justice Powell defined the question this way—"In the due process area, the question is whether intent is required before there can be a

'deprivation' of life, liberty or property." *Id.*, at 548 (opinion concurring in the result). The answer, according to Justice Powell, is yes. *Ibid.* He also warned that, even though the majority opinion was based on procedural due process, the substantive due process implications would "create new uncertainties as well as invitations to litigate under a statute [42 U. S. C. § 1983] that has already burst its historical bounds." *Id.*, at 553-554.

Amicus CJLF respectfully submits that Justice Powell was correct. It is time to recognize the wisdom of his opinion and adopt the rule he proposed.

A. Mental State, Section 1983, and Vicarious Liability.

By this point, it is well established that 42 U. S. C. § 1983 has no mental state element as such. See, *e.g.*, *Parratt*, 451 U. S., at 534-535 (quoting *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961)). Section 1983 merely provides a procedural vehicle for civil redress of an underlying violation of the Constitution. *Graham* v. *Connor*, 490 U. S. 386, 393-394 (1989). The mental element, therefore, is provided by the underlying violation. See *id.*, at 394.

This otherwise clear distinction becomes somewhat blurred when the person or entity sued is someone other than the one who personally committed the violation. The rule of respondeat superior does not apply. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 694-695 (1978). Under *Monell*, "a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue." *Canton* v. *Harris*, 489 U. S. 378, 385 (1989) (emphasis in original). For a "failure to train" claim, the "deliberate indifference" standard applies. *Id.*, at 388.

Yet despite the language of *Monell* and *Canton*, these cases remain a species of vicarious liability. "[N]either *Monell* . . . nor any of our other cases authorizes the award of damages against a municipal corporation based on the action of one of its officers when in fact the jury has concluded that the officer

inflicted no *constitutional* harm." *Los Angeles* v. *Heller*, 475 U. S. 796, 799 (1986) (*per curiam*) (emphasis added). Thus, a finding that the officer lacked the requisite mental state for the underlying alleged violation would negate municipal liability, even if the "deliberate indifference" standard for the city's own failure to train had been met.

In a sense, then, section 1983 does have a mental element of its own. When the plaintiff seeks to hold the municipality liable for the officer's actions, the "deliberate indifference" standard for the policymaker's mental state is layered on top of whatever mental state the particular claim requires on the part of the officer. This is "a substitute for the doctrine of respondeat superior" in such cases. *Collins* v. *City of Harker Heights*, 503 U. S. 115, 124 (1992). Deliberate indifference is the standard for the underlying claim, however, only in one type of Eighth Amendment case, and that is the type least analogous to the present case.

B. Fourth and Eighth Amendment Claims.

Graham v. *Connor* "reject[ed] [the] notion that all excessive force claims brought under § 1983 are governed by a single generic standard." 490 U. S., at 393. For both section 1983 claims and claims under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham*, 490 U. S., at 394 and n. 9.

For claims governed by the Fourth Amendment, "the 'reasonableness' inquiry in an excessive force case is an objective one . . . ." *Id.*, at 397. The officer's good-faith belief that the force is reasonable is not a defense. See *ibid.* While Fourth Amendment excessive force jurisprudence does have substantial problems, see *Tennessee* v. *Garner*, 471 U. S. 1, 32-33 (1985) (O'Connor, J., dissenting), it also contains an important self-limiting factor. The Fourth Amendment is simply inapplicable unless there has been a "search" or a

"seizure." "Violation of the Fourth Amendment requires an *intentional* acquisition of physical control." *Brower* v. *Inyo County*, 489 U. S. 593, 596 (1989) (emphasis added). A seizure occurs, for Fourth Amendment purposes, "only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.*, at 597 (emphasis in original). This standard does not include crashes in the course of a pursuit unless intentionally caused, *e.g.* by sideswiping the pursued vehicle. *Ibid.* Fourth Amendment liability, for all its problems, is less "open-ended" and has more "guideposts" than substantive due process. *Albright* v. *Oliver*, 510 U. S. 266, 271-272, (1994) (plurality). Its broad "objective reasonableness" test is therefore less of a problem than an open-ended *mens rea* for substantive due process would be.

For Eighth Amendment claims of failure to provide medical care to prisoners, *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976) established a "deliberate indifference" standard. In *Whitley* v. *Albers*, 475 U. S. 312, 317-318 (1986), the Ninth Circuit had applied that standard to an excessive force claim. This Court reversed, holding that the standard applicable to prison security measures taken during a disturbance was " 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2 1973) (Friendly, J.)." *Whitley*, 475 U. S., at 320-321. *Hudson* v. *McMillian*, 503 U. S. 1, 6-7 (1992) extended the *Whitley* standard to all prison excessive force claims. Interestingly, Judge Friendly's language, adopted by *Whitley*, was based on a substantive due process theory, not on the Eighth Amendment. See *Johnson*, 481 F. 2d, at 1032-1033.

The difference between the *Whitley* standard and the *Estelle* standard cannot be explained by pondering the meaning of "punishment," cf. *Farmer* v. *Brennan*, 511 U. S. 825, 837-838 (1994), for both standards are based on the same clause of the Constitution. The difference lies in the different situations. One requires immediate action; the other allows time for thought. One requires the balancing of other safety concerns;

the other does not. "[A] deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U. S., at 320.

Comparing the present case to the *Whitley-Estelle* dichotomy, we see it falls squarely on the *Whitley* side. Officers must act in haste and under pressure, and they must balance the risks of pursuit against both the direct and indirect costs of allowing offenders to escape. See *ante*, at 8-11.

Thus, the two kinds of constitutional claims most closely analogous to the present one both have an intent element. The Fourth Amendment only applies to intentional acquisitions of control, and the Eighth Amendment excessive force standard requires intentionally causing harm. In the prison security context, furthermore, *Whitley* expressly held that the protection of substantive due process extends no further than the standard announced in that case. 475 U. S., at 327.

C. Fuzzy Standards and Zones of Conduct.

The problem with the "deliberate indifference" standard is its failure to clearly inform police officers in advance what conduct will be considered a violation. This is illustrated by the decision below, which denied Deputy Smith's claim of immunity despite a precedent in another circuit holding that substantially the same facts did not state a cognizable claim. See *Temkin* v. *Frederick County Com'rs*, 945 F. 2d 716, 717, 723 (CA4 1991).

Whenever a court or a legislature establishes a standard of law, there are three zones of conduct established. Zone A is the conduct actually proscribed by the standard. A person who commits conduct in that zone is properly subject to punishment or payment of damages. Zone B is conduct which does not actually violate the standard, but which is close enough to go to

trial. Zone C is that conduct which is so clearly not a violation of the standard that any claims are quickly dismissed.

The big problem, of course, is Zone B. People whose conduct lies within Zone B are innocent, yet they are forced into the expense and trouble of discovery and trial, and they face the risk of being subjected to an errant jury decision. Innocent defendants in this zone often pay very substantial settlements on bogus claims simply to be rid of the litigation. Such cases are a form of legalized extortion.

Not only does such a standard victimize innocent people, but it "chills" lawful conduct by people who fear these consequences. In the context of police pursuits, officers and police departments will forego pursuits which an independent balancing would say are worth the risk.

As Justice Powell noted 16 years ago, 42 U. S. C. § 1983 "already ha[d] burst its historical bounds." *Parratt* v. *Taylor*, *supra*, 451 U. S., at 554. As he correctly predicted, the *Parratt* majority's equivocation on whether unintended deprivations can be constitutional violations has created uncertainties and invitations to litigate. *Id.*, at 553-554. This Court has already found it necessary to overrule *Parratt* in part and accept Justice Powell's position in part, excluding mere negligence claims. *Daniels* v. *Williams*, *supra*, 474 U. S., at 330-331. It is time, *amicus* submits, to go the rest of the way and accept Justice Powell's position in full. It is time to put an end to the uncertainty and hold that "substantive due process" is violated only by intentional deprivations. See 451 U. S., at 548.

Once this is done, substantive due process protection in the police pursuit context coincides with that of the Fourth Amendment, just as it does in other contexts. See *Albright* v. *Oliver*, 510 U. S. 266, 288-289, n. 2 (1994) (Souter, J., concurring in the judgment). An intentional deprivation in this context is a seizure under *Brower* v. *Inyo County*, 489 U. S. 593, 596-597 (1989), and Fourth Amendment jurisprudence provides the controlling standard under *Graham* v. *Connor*, 490 U. S. 386, 393 (1989).

V. The rule of *Parratt* v. *Taylor* should apply to all due process claims, whether procedural or substantive.

Justice Powell's position in *Parratt* v. *Taylor*, 451 U. S. 527 (1981), discussed in the preceding part, was based in part on his concern that the majority's rule could be evaded simply by recasting the claim as substantive, rather than procedural, due process. See *id.*, at 552-554 (opinion concurring in the judgment). The present case illustrates that his concern was well founded. A different but related approach to the same problem was stated by Justice Kennedy in *Albright* v. *Oliver*, 510 U. S. 266, 285 (1994) (opinion concurring in the judgment):

> "But the price of our ambivalence over the outer limits of *Parratt* has been its dilution and, in some respects, its transformation into a mere pleading exercise. The *Parratt* rule has been avoided by attaching a substantive rather than procedural label to due process claims (a distinction that if accepted in this context could render *Parratt* a dead letter) and by treating claims based on the Due Process Clause as claims based on some other constitutional provision. See *Taylor* v. *Knapp*, 871 F. 2d 803, 807 (CA9 1989) (Sneed, J., concurring). It has been avoided at the other end of the spectrum by construing complaints alleging a substantive injury as attacks on the adequacy of state procedures. See *Zinermon* v. *Burch*, 494 U. S. 113, 139-151 (1990) (O'Connor, J., dissenting); *Easter House* v. *Felder*, 910 F. 2d 1387, 1408 (CA7 1990) (Easterbrook, J., concurring). These evasions are unjustified given the clarity of the *Parratt* rule: In the ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment *simpliciter*.' 451 U. S., at 536."

The substantive law of California is that drivers of emergency vehicles are exempt from specific rules of the Vehicle

Code, but "they are not relieved of the general duty to drive with due care . . . ." 5 B. Witkin, Summary of California Law § 230, p. 315 (9th ed. 1988). Any driving action that would meet a heightened *mens rea* requirement beyond negligence would necessarily be an action unauthorized by California law.

If we look past the forms of pleading, we see that the essence of the complaint in this case is the same as in *Parratt*, *Hudson* v. *Palmer*, 468 U. S. 517 (1984), and *Albright*. In all three cases, the plaintiff's injury was the result of an allegedly wrongful act of an individual government employee and not a failure to provide a predeprivation hearing or other process. See *Parratt*, 451 U. S., at 530 (negligent loss of property by prison employees); *Hudson*, 468 U. S., at 230 (destruction of personal property during cell search); *Albright*, 510 U. S., at 268-269 (initiation of criminal proceedings). The line between "procedural" and "substantive" due process, although clear in other contexts, is vanishingly faint here.

The classic procedural due process claim is a contention that the procedure provided by the state is inadequate to test whether the deprivation is or is not justified by the substantive law. In *Fuentes* v. *Shevin*, 407 U. S. 67, 70, 96 (1972), for example, Mrs. Fuentes had no opportunity before seizure to state her position that, due to a breach of the seller's obligations, she had the right to withhold payment. The classic substantive due process claim is that the substance of state law violates a right "deeply rooted in our legal tradition," see *Washington* v. *Glucksberg*, 521 U. S. ___, 65 U. S. L. W. 4669, 4674 (June 26, 1997) or, in another view, that the state law "falls . . . outside the zone of what is reasonable in the way it resolves the conflict between the interests of the state and individual." *Id.*, at 4688 (Souter, J., concurring in the judgment). In such a case the adequacy of state procedure does not defeat the claim because any procedure would conclude with the enforcement of the unreasonable substantive law. See *id.*, at 4687 (quoting *Poe* v. *Ullman*, 367 U. S. 497, 541 (1961) (Harlan, J., dissenting)).

A case in which predeprivation process is impractical, state postdeprivation process is adequate, and state substantive law is reasonable fits neither of these categories squarely. That lack of fit suggests that claims in such cases are not due process claims at all.

Rochin v. *California*, 342 U. S. 165 (1952) is often cited as a substantive due process case, but it is not. Rochin was convicted of possession of morphine after he swallowed the evidence and the police forcibly extracted it from his stomach. *Id.*, at 166. The illegality of the officers' conduct was not an issue in this Court. Rochin had alleged a Fourth Amendment violation.[8] *People* v. *Rochin*, 101 Cal. App. 2d 140, 141, 225 P. 2d 1, 2 (1950); see also *id.*, at 144, 225 P. 2d 913, 914 (Carter, J., dissenting from denial of review) (discussing Fourth Amendment, parallel provision of state constitution, and exclusionary rule). The state court held that there had been a violation, but that Rochin's remedy was an action for damages. *Id.*, at 143, 225 P. 2d, at 3.

This issue before this Court in *Rochin* was the "conduct of the criminal proceedings," 342 U. S., at 168, *i.e.*, the use of that evidence to convict Rochin. Applying *Brown* v. *Mississippi*, 297 U. S. 278 (1936), a procedural due process case, *Rochin* held that the process by which Rochin had been convicted, not the extraction itself, violated the Due Process Clause. 342 U. S., at 173-174.

There are, of course, cases which entertain section 1983 actions on "Due Process . . . *simpliciter*" without inquiring about state law or remedies. *Youngberg* v. *Romeo*, 457 U. S. 307 (1982), for example, was an action for damages by a person confined in an institution for the retarded, claiming unsafe and overly restrictive conditions and lack of training. *Id.*, at 309.

---

8. The Fourth Amendment had been "incorporated" by 1952, although the exclusionary rule had not. See *Wolf* v. *Colorado*, 338 U. S. 25, 27-28, 33 (1949), overruled on the latter point in *Mapp* v. *Ohio*, 367 U. S. 643, 654-655 (1961).

After discussing the standards for liability, the Court remanded for a new trial without ever mentioning state remedies. *Id.*, at 324-325. However, cases are not authority for questions which merely lurk in the record. *Webster* v. *Fall*, 266 U. S. 507, 511 (1925).

The Fourteenth Amendment does not forbid states from depriving people of life, liberty, or property; it only commands that due process of law be provided for such deprivations. U. S. Const., Amdt. 14, § 1. A contention that process is irrelevant to a constitutional provision that commands nothing but process is more than a little strange. Substantive review of legislation can come within the text of "due process" on the theory that the legislation itself works the deprivation and is part of the process. See *Poe*, *supra*, 367 U. S., at 541 (Harlan, J., dissenting). Where there is no attack on the content of state law, however, state process must be a factor if there is to be any connection at all with the actual text of the Fourteenth Amendment.

State tort law, not the Constitution, is the normal source for rules "to regulate liability for injuries that attend living together in society." *Daniels* v. *Williams*, 474 U. S. 327, 332 (1986). The fact that the defendant is a peace officer does not, by itself, change that allocation. See *id.*, at 332-333. The command of the Fourteenth Amendment is addressed to the state. While the state can, does, and must act through its officers, it also acts through its laws and courts. When the state's laws and courts provide remedies for the losses that inevitably flow from a government operated by fallible humans, it is difficult to see how the state as a whole has failed in its constitutional obligation to provide due process of law.

We should not forget that "the Due Process Clause . . . was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression' . . . ." *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189, 196 (1989). Thus, while there is no "abuse of governmental power" element of section 1983 "*separate and apart* from the

proof of a constitutional violation," *Collins* v. *City of Harker Heights*, 503 U. S. 115, 119 (1992) (emphasis added), abuse or the lack of it is very relevant to the question of whether there has been a violation of the Due Process Clause. See *id.*, at 126.

The state has not abused its power in this case. It has provided a procedure, a forum, and a reasonable rule of law. It has provided all the process that is due. "The commonsense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer." *Albright*, *supra*, 510 U. S., at 284 (Kennedy, J., concurring in the judgment). The questions in this case are prime examples. There is no basis for federal intervention here.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

August, 1997

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(12)

Supreme Court, U.S.
FILED
AUG 8 1997
CLERK

No. 96-1337

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, AND JAMES EVERETT SMITH,

Petitioners,

v.

TERI LEWIS AND THOMAS LEWIS, personal representative of estate of Phillip Lewis,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CITY AND COUNTY OF DENVER, COLORADO, IN SUPPORT OF PETITIONERS

THEODORE S. HALABY
Counsel of Record
ROBERT M. LIECHTY
HALABY CROSS LIECHTY & SCHLUTER
1873 South Bellaire Street
Suite 1400
Denver, CO 80222
Telephone: (303) 691-5300

Special Counsel for the City and County of Denver

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19pp

TABLE OF CONTENTS

		Page
I.	SUMMARY OF ARGUMENT	1
II.	ARGUMENT	2
	1. Accidents Do Not Implicate the Constitution	2
	a. There was no Fourth Amendment violation	3
	b. The Fourteenth Amendment is not implicated	7
	2. If the Fourteenth Amendment is Implicated, Only Conduct that Shocks the Conscience May Establish a Deprivation	13
III.	CONCLUSION	16

TABLE OF AUTHORITIES

Page

Albright v. Oliver, 510 U.S. 266 (1994).....2, 11

Apodaca v. Rio Arriba County Sheriff's Department, 905 F.2d 1445 (10th Cir. 1990)..... 15

Baker v. McCollan, 443 U.S. 137 (1979).....2, 11

Brower v. Inyo County, 489 U.S. 593 (1989)..3, 4, 5, 6, 8

Clark v. Buchko, 936 F.Supp. 212 (D. N.J. 1996)..... 6

Collins v. City of Harker Heights, 503 U.S. 115 (1992) 7, 8, 11, 12

Daniels v. Williams, 474 U.S. 327 (1986).....7, 12

Dodd v. City of Norwich, 827 F.2d 1 (2nd Cir. 1987) 6

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996).....13, 14

Glasco v. Ballard, 768 F.Supp. 176 (D. Va. 1991) 6

Graham v. Connor, 490 U.S. 386 (1989) 2, 3

Hill v. Shobe, 93 F.3d 418 (7th Cir. 1996)..... 8, 9, 13

Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1996)..... 1

Matthews v. City of Atlanta, 699 F.Supp. 1552 (D. Ga. 1988)..... 6

Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992)..... 15

Paul v. Davis, 424 U.S. 693 (1976) 9

Siegert v. Gilley, 500 U.S. 226 1991)..... 11

Troublefield v. City of Harrisburg, 789 F.Supp. 160 (D. Pa. 1992) 6

BRIEF OF *AMICUS CURIAE* CITY AND COUNTY OF DENVER, COLORADO, IN SUPPORT OF PETITIONERS

Amicus curiae City and County of Denver, Colorado, supports the petitioners in this action.

For purposes of the issues raised in the instant brief, the material facts are as follows: Deputy Smith was entitled to attempt a lawful stop of suspects fleeing on a motorcycle and intended to accomplish this by pursuing and overtaking the motorcycle. Instead, an accident occurred as a result of the excessive speed of the pursuing patrol unit when it could not avoid hitting and thereby killing the passenger of the motorcycle (Mr. Lewis) after the motorcycle had skidded to a halt. *See Lewis v. Sacramento County*, 98 F.3d 434, 437 (9th Cir. 1996). It is further undisputed that the pursuing officer did not intend to collide with the passenger, but only to apprehend him, and that the police vehicle was not being used as an instrument of force in the apprehension. The passenger's estate brought suit under 42 U.S.C. § 1983 alleging a Fourteenth Amendment deprivation.

I. SUMMARY OF ARGUMENT

Automobile accidents do not implicate the Constitution whether the claim is submitted under the Fourth Amendment or under the Fourteenth Amendment. Furthermore, *amicus* Denver submits that this Court should not extend the protections of the Due Process Clause to accidental death such as is found in this case because this type of injury is not contemplated under the Fourteenth Amendment and is traditionally reserved for recovery

under state tort law. Finally, if this Court recognizes a constitutional implication arising from these facts, it should hold that the standard of conduct which violates the Fourteenth Amendment under these facts is conduct which shocks the conscience.

II. ARGUMENT

1. Accidents Do Not Implicate the Constitution

Because Mr. Lewis was seized, this case at least on its face implicates the Fourth Amendment. Additionally, the Fourteenth Amendment's prohibition on deprivation of life without substantive due process, also, at least on its face, may apply to the facts herein. Indeed, it is in this context that the Ninth Circuit, the parties, and other *amici* analyze the case. Because resolving the issue of whether accidents come within the reach of the Constitution is germane to either Fourth Amendment or Fourteenth Amendment analysis, both Amendments are analyzed below in the context of whether accidental injury invokes either Amendment.

"The first step in any [§ 1983] claim is to identify the specific constitutional right allegedly infringed." *See Albright v. Oliver*, 510 U.S. 266, 271 (1994), citing *Graham v. Connor*, 490 U.S. 386, 394 (1989); and *Baker v. McCollan*, 443 U.S. 137, 140 (1979). As in *Albright*, the Amendment upon which the courts below have focused was the Fourteenth Amendment. However, in *Albright*, this Court initially focused on the Fourth Amendment. Similarly, the Fourth Amendment should be this Court's initial focus in the instant case.

a. There was no Fourth Amendment violation

Deputy Smith clearly intended to apprehend Mr. Lewis and his driver. As this Court stated in *Graham v. Connor*, 490 U.S. at 395, seizures are analyzed under the Fourth Amendment, not under the substantive prong of the Due Process Clause. Thus, the first question is whether the injury was the result of "a governmental termination of freedom of movement *through means intentionally applied*" which implicates the Fourth Amendment. *See Brower v. Inyo County*, 489 U.S. 593, 597 (1989) (emphasis in original).

The instant case begins with the analysis first mapped in *Brower*. *Brower* addressed whether a road block implicated the Fourth Amendment. Ironically, this Court in *Brower* analogized the situation presented to it with "a police chase in which the suspect unexpectedly loses control of his car and crashes," *id.* at 595, *i.e.*, facts similar to those now before this Court, although the hypothetical accident in *Brower* did not involve the officer's car. This Court agreed that no seizure would occur in such a hypothetical (*id.*) because "the Fourth Amendment requires an intentional acquisition of physical control." *Id.* at 596. Obviously, because the hypothetical fleeing suspect had had an accident involving only himself, there was no acquisition of physical control and no Fourth Amendment implication.

On the other hand, this Court stated that a police chase could result in a Fourth Amendment seizure if "the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then termination of the suspect's freedom of movement would have been a

seizure." *Id.* at 597. In other words, under circumstances where the police vehicle, itself, was intentionally used as an instrument of force in the apprehension, there may be Fourth Amendment implications. This second hypothetical situation results in "a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), [because] . . . there is a governmental termination of freedom of movement *through means intentionally applied.*" *Id.* (emphasis in original).

The instant facts are different in one significant respect: while Deputy Smith did desire to terminate Mr. Lewis' freedom of movement, he did not intend to use his vehicle to strike Mr. Lewis to accomplish this purpose. Instead, Mr. Lewis was struck as a result of an accident, notwithstanding the fact that the accident would not have occurred had the officer not intended to apprehend the suspects by pursuit in the first instance.

This Court is now confronted with the issue, addressed in Justice Stevens' concurrence in *Brower*, in defining how "the concept of intent is useful in applying the Fourth Amendment." *Id.* at 601. On this point, this Court stated:

> In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the *accidental* discharge of a gun[1]

[1] In this hypothetical, the officer intended to use the gun as a striking weapon, not as a weapon which fired a bullet. This factual scenario is distinguished from where the officer purposefully draws his weapon but accidentally discharges it. The lower courts are in agreement that such accidental firings are not seizures. *See infra.*, p. 6.

> with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.

Id. at 598-99 (emphasis added). Thus, at least on first blush, the facts of the instant case come under the purview of a Fourth Amendment seizure as defined in *Brower* because Deputy Smith "set in motion" his police vehicle intending to seize Lewis, and Lewis was "stopped by the very instrumentality set in motion."

However, in the two examples cited in *Brower*, the officer put in motion an instrumentality which obtained the intended result, that is, the officer meant to use physical force against the first suspect (whom he meant to bludgeon) and meant to shoot the second suspect (in the leg). In the instant case, the officer also intended to seize the passenger, but he clearly did not intend to apprehend him by striking him with the police vehicle. The motor vehicle accident was an unintended consequence. While Mr. Lewis' estate claims that this nonetheless invokes the Constitution, this is incorrect because, as this Court stated in *Brower*, "the Fourth Amendment addresses 'misuse of power' [citation omitted], not the accidental effects of otherwise lawful government conduct." *Brower*, 489 U.S. at 596.

Thus, the instant case addresses the very same issue inherent in *Brower*, to wit, whether the injury sued upon is an "accidental effect of otherwise lawful government conduct," *id.*, which does not invoke the Constitution, or whether the injury is the result of "the very instrumentality set in motion or put in place to achieve the seizure," *id.* at 599, which does implicate the Constitution.

This case squarely presents to this Court the question of how far the Constitution will reach into areas traditionally reserved for the States, *i.e.*, into tort litigation. It is respectfully submitted that the instant case, because the injury results from an accident, does not invoke the Constitution.

The lower courts have applied this same analysis to Fourth Amendment claims. In a Fourth Amendment, accidental-shooting case, the Second Circuit has stated that "[i]t makes little sense to apply a standard of reasonableness to an accident." *See Dodd v. City of Norwich*, 827 F.2d 1, 2 (2nd Cir. 1987). The District Courts have also stated that accidental shootings do not invoke the Fourth Amendment "because the officers lacked intent to seize the victims by firing the guns." *See Clark v. Buchko*, 936 F.Supp. 212, 219 (D. N.J. 1996). *See also Troublefield v. City of Harrisburg*, 789 F.Supp. 160 (D. Pa. 1992), *aff'd*, 980 F.2d 724 (3d Cir. 1992); *Matthews v. City of Atlanta*, 699 F.Supp. 1552 (D. Ga. 1988); and *Glasco v. Ballard*, 768 F.Supp. 176 (D. Va. 1991).

Because this case involves a seizure, it should be analyzed under the Fourth Amendment; under the facts

of this case, the Fourth Amendment was not violated and the claim should be dismissed.

b. The Fourteenth Amendment is not implicated.

The respondent plaintiffs claim that the death of their son implicates the Fourteenth Amendment; however, the Fourteenth Amendment does not apply to the instant automobile accident because such an accident has been deemed to arise under traditional state tort law, not under the Constitution. The case herein is

> analogous to a fairly typical state-law tort claim: [the officer] breached his duty of care . . . by failing to [drive his car safely]. Because the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society' [citation omitted], we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.

Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992), quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986), which continues as follows: "We have previously rejected reasoning that would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." (Interior quotations omitted.) The *Daniels* Court noted that the history of the Clause reflected that it was "intended to secure the individual from the arbitrary exercise of the powers of government," and "to prevent governmental power from being 'used for purposes of

oppression.' " *Id.* at 331. That history simply does not support a claim that the Fourth or Fourteenth Amendments extend to *accidental* deprivations of life.

In this context, the word "accident" is used in its traditional sense: a mishap, a mistake, an unintended result. This does not mean that the event was unforeseen because, in retrospect, many accidents are foreseeable. However, it is contrasted with the hypothetical this Court used in *Brower*, 489 U.S. at 599, when this Court stated that a Fourth Amendment seizure could arise where a police officer, who meant to bludgeon the suspect with a gun, accidentally shot the suspect. In that example, the officer meant to seize the suspect with force; however, in the instant example, the officer intended to seize the motorcycle and its occupants without using physical force to apprehend them.

Because this case involves an accident, it does not involve the arbitrary use of state power vis a vis the deceased. It merely concerns a violation of a rule of the road, *i.e.*, excessive speed or following too closely. Thus, because the case herein concerns "rules of conduct to regulate liability for injuries that attend living together in society," *see Collins*, 503 U.S. at 128, it does not invoke the protections of the Constitution.

The Seventh Circuit applied the same general reasoning in a police-chase case. *See Hill v. Shobe*, 93 F.3d 418, 421, fn. 2 (7th Cir. 1996), which disposed of a constitutional claim with the remark that "the key word is 'accident.' " *Hill* arose under facts somewhat similar to those presented herein where the officer was on an emergency

run and collided with a bystander.[2] The Seventh Circuit held that such cases did not invoke the Constitution unless the officer actually "intended" the accident: "motor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation actionable under § 1983, absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it." *Id.* at 420. This example is not an accident because the encounter could have been avoided but the officer intentionally chose not to avoid it.

This Court foresaw the problem in blurring the distinction between the Constitution and traditional torts years ago in *Paul v. Davis*, 424 U.S. 693, 698-99 (1976), when it warned against the very extension of the Constitution urged upon this Court:

> And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander *mistakenly shot by a policeman* or *negligently killed by a sheriff driving a government vehicle*, would not have claims equally cognizable under § 1983 (emphasis added).

---

[2] The obvious difference between the *Hill* facts and those before the Court is that in *Hill* the officer did not intend to restrict the freedom of movement of the bystander. Thus, *Hill* could arise only under the Fourteenth Amendment, not under the Fourth Amendment.

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and sheparded the adoption of that Amendment to learn that it worked such result and a study of our decisions convinces us they do not support the construction urged by respondent.

The "logical stopping place" that this Court should draw for any constitutional claim is that line drawn between accidental injury and injury caused by intended state action. Although it may first appear that the requirement of intended state action is a difficult burden of proof, that is not at all the case. Indeed, it is difficult to imagine actionable state action which is not intended.

This is not to be confused with intentional conduct attended by unintended results. At no time did the officer intend to use his police vehicle as an instrumentality of force against the motorcycle driver or his passenger. Thus, it is a true accident. Indeed, but for the fact that the officer in the instant case generally intended to close the distance between himself and the suspects, there is nothing conceptually different between the accident herein and a hypothetical accident involving the officer as he was routinely patrolling his jurisdiction .and struck a pedestrian.

As stated above, the Fourteenth Amendment is not implicated herein because accidental injury is the grist of tort litigation, not of constitutional litigation. Nor will a

state actor's mere state of mind elevate a tort to constitutional implications. As this Court has stated previously, the reach of the Constitution should not be confused with what level of conduct (or state of mind) establishes a constitutional deprivation. The state actor's state of mind, no matter how egregious, does not hail constitutional protections to situations where the Constitution has no say: "[o]ur decision . . . did not turn, however, on the state of mind of the defendant, but on the lack of any constitutional protection. . . . " *Siegert v. Gilley*, 500 U.S. 226, 234 (1991). *See also Baker*, 443 U.S. at 140: "If there has been no such [constitutional] deprivation, the state of mind of the defendant is wholly immaterial."

Application of the substantive Due Process Clause to an automobile accident in the first instance is also unfounded because substantive due process has traditionally been applied only to personal relations:

> "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisonmaking in this unchartered area are scarce and open-ended." The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.

See Albright v. Oliver, 510 U.S. 266, 271-72 (1994) (declining to extend the substantive Due Process Clause to a malicious prosecution-type claim). "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break ground in this field," *i.e.*, the expansion of substantive due process protections. *Collins*, 503 U.S. at 125.

Given these twin considerations, (1) that the matter herein does not concern a traditional subject of the Due Process Clause and (2) that the matter herein is a traditional state tort, it is respectfully submitted that this Court should find that the Fourteenth Amendment does not apply. " 'Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive their person of life, liberty, or property.' " *Collins*, 503 U.S. at 127, n. 10, quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis in original). A line must be drawn distinguishing traditional torts from substantive due process violations, and this Court has instructed that the line-drawing in this area should be done with judicial self-restraint:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisonmaking in this uncharted area are scarce and open-ended. [Citation omitted.] The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins, 503 U.S. at 125. Thus, because this case does not involve a deliberate decision of Deputy Smith to deprive Mr. Lewis of his life, the Fourteenth Amendment is not implicated in the first instance.

Finally, there is no need to extend the Due Process Clause to the facts herein. This type of case, that is, an automobile accident, is routinely adequately addressed in the state tort context. There is simply no compelling reason for this Court to extend the reach of the Due Process Clause into areas best left to state or local control.

Thus, the claim under the Fourteenth Amendment should not be recognized.

2. If the Fourteenth Amendment is Implicated, Only Conduct that Shocks the Conscience May Establish a Deprivation

However, assuming for the sake of argument that the Fourteenth Amendment is implicated, only conduct which shocks the conscience establishes a viable claim under this Amendment. This is the majority view in chase cases:

> The majority view of the minimum threshold in cases like this [a police chase case] is correct. Accordingly, we hold that police officers' deliberate indifference to a victim's rights, standing alone, is not a sufficient predicate for a substantive due process claim in a police pursuit case. Rather, in such a case, the plaintiff must also show that the officers' conduct shocks the conscience.

See Evans v. Avery, 100 F.3d 1033, 1037-38 (1st Cir. 1996). *See also Hill v. Shobe*, 93 F.3d at 421 (adopting "criminal recklessness" as the standard in emergency-run cases; affirming dismissal of a case which alleged mere civil recklessness).

> [I]t is particularly appropriate to measure police pursuits in that way. Police chases are not only a necessary concomitant of maintaining order in our modern society, but they are also inherently hazardous. By their very nature, they inevitably create some risk of injury to bystanders. Officers must decide the balance between law enforcement and risk to public safety quickly and while

> under considerable pressure. In such circumstances, permitting the Due Process Clause to serve as a surrogate for state tort law would hamstring the police in their performance of vital duties.

Evans, 100 F.3d at 1038. Hence the reason for the exceptionally high standard. Anytime an officer is involved in a police chase or in an emergency run (for instance, speeding to the scene of a crime), he or she is involved in a dangerous activity because such driving inevitably involves violation of the normal rules of the road. However, every State allows its officers to violate the rules of the road under emergency circumstances.

If this Court were to adopt a lower standard such as recklessness or deliberate indifference,[3] this would be too low of a threshold (because of the inherent dangerousness involved in all emergency runs). Anytime an officer violates the rules of the road, there is always an argument that he acted recklessly which, under a typical set of facts, would be the same as saying that he was deliberately indifferent; indeed, any chase is a deliberate action by the officer and, given the fact that the officer is aware of the inherent risks in a chase, an injured party could always in good faith claim that the officer was indifferent to the risk anytime an injury actually resulted. In short, if this Court were to adopt any standard lower than a shocks-the-conscience standard, then, given the inherent

[3] At least one commentator has found that "there appears to be no discernable difference between indifference, recklessness, wantonness and wilfulness. . . . " *Kritchevsky, Making Sense of State of Mind*, 60 Geo. Wash. L. Rev. 417, 470 n. 279 (1992).

risks involved in any high-speed run, the ultimate claim for all practical purposes would amount to nothing more than the officer's mistake in judgment.

Nor is this merely a matter of artful pleading simply because the inherent risks in a high-speed pursuit arguably encompass true reckless conduct, no matter how well-trained the officer might be. Although lower courts could correctly recharacterize the facts, *see Medina v. City and County of Denver*, 960 F.2d 1493, 1500 (10th Cir. 1992) (recharacterizing a police expert's conclusion that the City's pursuit policy demonstrated deliberate indifference when, in fact, the facts only supported a claim of negligence); and *Apodaca v. Rio Arriba County Sheriff's Department*, 905 F.2d 1445, 1446 n. 3 (10th Cir. 1990) (recharacterizing an officer's driving conduct as negligent rather than as reckless and wanton as was plead), such judicial tinkering after litigation has been filed does nothing to outline for the officer on the street what is and what is not permissible under the Constitution.

III. CONCLUSION

In conclusion, *amicus* respectfully requests that this Court reverse the opinion of the Ninth Circuit and hold that police vehicle-involved automobile accidents, where the police vehicle is not intentionally used as an instrumentality of force, does not implicate either the Fourth or the Fourteenth Amendment. In the alternative, if this Court finds a constitutional implication, amicus respectfully requests that this Court establish a shocks-the-conscience standard in order to create a Fourteenth Amendment deprivation under the facts at hand.

Respectfully submitted,

THEODORE S. HALABY
Counsel of Record
ROBERT M. LIECHTY
HALABY CROSS LIECHTY
& SCHLUTER
1873 South Bellaire Street
Suite 1400
Denver, CO 80222
Telephone: (303) 691-5300

Attorneys for Amicus Curiae
City and County of Denver

Supreme Court, U.S.
FILED
OCT 3 1997
CLERK

No. 96-1337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, AND JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS AND THOMAS LEWIS, PERSONAL REPRESENTATIVES OF THE ESTATE OF PHILIP LEWIS,

Respondents

On Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

RICHARD D. HALEY, ESQ.
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500
President, The Association of Trial Lawyers of America

HOWARD A. FRIEDMAN, ESQ.*
90 Canal Street
Boston, MA 02114
(617) 742-4100
Attorney for Amicus Curiae
**Counsel of Record*

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

POLICE OFFICERS' ACTIONS DURING HIGH SPEED PURSUITS MAY VIOLATE THE SUBSTANTIVE DUE PROCESS RIGHTS OF A VICTIM INJURED DURING THE COURSE OF A POLICE PURSUIT IF THE OFFICERS DISPLAY DELIBERATE INDIFFERENCE OR RECKLESS DISREGARD 3

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Board of County Commissioners v. Brown, ___ U.S.___, 117 S.Ct. 1382 (1997) 5

Boddie v. Connecticut, 401 U.S. 371 (1971) 12

Braley v. City of Pontiac, 906 F.2d 220 (6th Cir. 1990) 12

Brower v. County of Inyo, 489 U.S. 593 (1989) 4

Cassady v. Tackett, 938 F.2d 693 (6th Cir. 1991) 12

Collins v. Harker Heights, 503 U.S. 115 (1992) 7, 8, 9, 13

Daniels v. Williams, 474 U.S. 327 (1986) 4

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996) 5

Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994) 5, 10, 12

Herrera v. Collins, 113 S.Ct. 853 (1993) 12

Irvine v. California, 347 U.S. 128 (1953) 11

Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996) 8

L.W. v. Grubbs, 92 F.3d 894 (9th Cir. 1996) 12

Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1996) 5

Mansfield v. Mansfield, 988 F.2d 1469 (6th Cir 1993) 12

Mapp v. Ohio, 367 U.S. 643 (1961) 10

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) 12

Medina v City and County of Denver, 960 F. 2d 1493 (10th Cir. 1992) 5, 6

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) 12

Rochin v. California, 342 U.S. 165 (1952) 10, 11

Temkin v. Frederick County Commissioners,

945 F.2d 716 (4th Cir 1991) 14

Tennessse v.Garner, 471 U.S. 1 (1985) 13

Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995) 13

Other Authorities

Black's Law Dictionary (6th ed. 1990) 9

Model Penal Code, §2.02(2) 6

Nahmod, *Civil Rights and Civil Liberties Litigation* (Shepard's/McGraw Hill, Inc, 3d. ed. 1996 Supp.) 5

Restatement (Second) of Torts §500 (1965) 6

Scalia, Antonin, *The Rule of Law as a Law of Rules*, 56 U.Chi.L.Rev. 1175 (1989) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1337

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, AND JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS AND THOMAS LEWIS, PERSONAL REPRESENTATIVES OF THE ESTATE OF PHILIP LEWIS,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") is a voluntary bar association whose 55,000 members primarily represent injured persons, including those who are injured by police misconduct or are otherwise victims of civil

rights violations. All parties have consented in writing to the submission of this brief, and the appropriate letters of consent have been filed with this Court.[1] ATLA believes its broad, nationwide perspective can be of aid to this Court in its consideration of governmental responsibility for decisions which jeopardize public safety.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented by the Respondents.

SUMMARY OF ARGUMENT

High-speed police pursuits are an extremely dangerous governmental activity. There is a danger to the lives of both the participants and innocent people in the area of the pursuit. High-speed pursuits frequently end with an accident. A 1992 study in Illinois found that 18% to 44% of pursuits resulted in accidents, 5% to 24% resulted in injury, and 1% to 3% ended in death. The majority of police pursuits are for traffic offenses, 52% to 63% in the Illinois study. Approximately the same number of people die as a result of police pursuits in the United States as die from police shootings. A clear standard regulating pursuits is needed to reduce the number of tragedies from pursuits.

Police pursuits which reflect deliberate indifference to, or reckless disregard for, a person's right to life or bodily integrity should be held to violate the Fourteenth Amendment. The deliberate indifference or reckless disregard

---

[1] Pursuant to Rule 37.6, Amicus Curiae discloses that no counsel for a party authored any part of this Brief, not did any person or entity other than Amicus Curiae, its members, or its counsel make any monetary contribution to the preparation or submission of this Brief.

standard is easily defined and well-known to the law. This is a stringent standard to be applied to uniquely governmental activities. It does not threaten to constitutionalize tort law. Under the deliberate indifference or reckless disregard standard, police officers will be liable for violating victims' due process rights only when the police officers consciously disregard a substantial risk of harm during the course of a high speed pursuit.

The "shocks the conscience" standard fails to place any meaningful restrictions on a police officer's behavior during the course of a high speed pursuit. In practice, the "shocks the conscience" standard gives police officers virtual immunity from constitutional liability for all actions occurring during the course of a pursuit, no matter how egregious their actions.

ARGUMENT

POLICE OFFICERS' ACTIONS DURING HIGH SPEED PURSUITS MAY VIOLATE THE SUBSTANTIVE DUE PROCESS RIGHTS OF A VICTIM INJURED DURING THE COURSE OF A POLICE PURSUIT IF THE OFFICERS DISPLAY DELIBERATE INDIFFERENCE OR RECKLESS DISREGARD

Police pursuits are dangerous.[2] There are nearly forty motor vehicle accidents every day in the United States as a

---

[2] Amicus understands that Solutions to the Tragedies of Police Pursuits (STOPP) is filing an Amicus Brief focusing on statistical analysis of pursuits. That material will not be duplicated here, but a few facts are important: The National Highway Safety Traffic Administration has

result of police pursuits There is a pursuit-related death somewhere in this country almost every day. The ability to pursue suspects is a necessary police function, given the primary mission of law enforcement - to protect lives and to protect the public. Nevertheless, a police officer's decision to begin a pursuit and to continue a pursuit requires consideration of the risk to human life as a result of the pursuit. In light of the threat to life from a pursuit, the decisions made by police officers in pursuits directly implicate the protection of the due process clause of the Fourteenth Amendment.[3]

Negligence by governmental employees is a matter of state tort law; it is not a violation of the due process clause. *Daniels v. Williams*, 474 U.S. 327 (1986). However, in *Daniels* this Court expressly reserved the question "whether something less than intentional conduct, such as recklessness or 'gross negligence', is enough to trigger the protections of the Due Process Clause." *Id.* at 334 n.3. Amicus submits that the proper standard to be applied in substantive due process police chase cases is "deliberate indifference" to or "reckless disregard" of the known dangers of a pursuit. This standard provides protection from needless risk to life without constitutionalizing tort law.

---

documented 5306 deaths occurring during the course of pursuits in the last sixteen years. A study of police pursuits in Illinois for the AAA Foundation for Traffic Safety found that between 18% to 44% of pursuits resulted in accidents, 5% to 24% resulted in injury and 1% to 3% ended in death. The majority of police pursuits were initiated for traffic offenses, 52% to 63%. Studies consistently show that the majority of police pursuits are initiated for traffic offenses.

3 This Court has already decided that unless an officer intends a seizure police pursuits do not implicate the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593 (1989).

All of the lower courts which have considered the issue have held the improper conduct of police officers during a high speed pursuit may violate an injured party's Fourteenth Amendment substantive due process right to life.[4] However, there is a conflict among the Circuits with respect to the proper standard to be applied in substantive due process police pursuit cases. Some courts have applied the deliberate indifference or reckless disregard standard while others have required that the police conduct meet the "shocks the conscience of a civilized society" standard. Amicus submits that the Ninth Circuit correctly applied the deliberate indifference or reckless disregard standard.[5]

In all pursuits the need for the immediate apprehension of a suspect due to his danger to the public must be weighed against the risk to public safety created by the pursuit. Indifference to the risks to public safety threatens members of the public. The deliberate indifference standard is capable of definition so that it can be incorporated into police training. Permitting liability for deliberate indifference to the risk of harm to human life will, in the view of Amicus, help to reduce the number of tragedies from pursuits.

This Court recently discussed the deliberate indifference standard in *Board of County Commissioners v. Brown*, ___ U.S.___, 117 S.Ct. 1382 (1997). Justice O'Connor noted in *Brown* that "deliberate indifference" is a stringent standard of fault. *Id.* at 1391. Justice O'Connor further opined that to satisfy the deliberate indifference standard requires proof that

---

4 See, e.g., *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996); *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996); *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994) (en banc); *Medina v. City and County of Denver*, 960 F. 2d 1493 (10th Cir. 1992).

5 *See* Nahmod, *Civil Rights and Civil Liberties Litigation*, §13.10, 1996 Supp. (Shepard's/McGraw Hill, Inc, 3d. ed.).

a municipal actor disregarded a known or obvious consequence of his action. *Id.* Amicus submits that the deliberate indifference standard is the appropriate constitutional standard for police pursuits.

A well-reasoned definition of "reckless disregard" was provided in *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992). As the Tenth Circuit stated:

> Reckless intent does not require that the actor intended to harm a particular individual; reckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences. [citation omitted]. Thus, reckless intent involves disregard of a particular risk rather than intent to cause a particularized harm.

Id. at 1496.

The Restatement (Second) of Torts, §500 (1965), indicates that reckless indifference exists when a person acts:

> in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

The Model Penal Code, §2.02(2)(c), similarly defines "recklessness" as conscious disregard of "a substantial and unjustifiable risk."

Petitioner argues that this Honorable Court's decision in *Collins v. Harker Heights*, 503 U.S. 115 (1992), mandates rigid adherence to the "shocks the conscience" standard in all substantive due process cases. This is incorrect. In *Collins*, this Court held that a governmental employer's duty to provide its employees with a safe working environment was not a substantive component of the due process clause. *Id.* at 130. This Court was understandably reluctant to expand the concept of substantive due process into new areas such as the workplace, and noted that the plaintiff's claim was unprecedented. *Id.* at 127.

The plaintiff's claim in *Collins* was analogous to a "fairly typical state law tort claim" alleging that a municipal employer breached a duty of care to its employee. *Id.* at 128. This Court concluded that the plaintiff's complaint alleged omissions by the city that could not "properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense." *Id.* The Court in *Collins* did not address the question of whether the defendant's actions in a particular case should be judged by the standard of "reckless disregard," "deliberate indifference," "arbitrariness" or "shocks the conscience."

Amicus does not argue that anyone injured in an automobile accident with a vehicle driven by a government employee has a constitutional claim, even if the employee is a police officer. The due process clause is implicated when a police officer makes the *decision* to engage in a pursuit and makes the *decision* to continue a pursuit. The prohibited conduct is not simple negligence; a *decision* is made to pursue a suspect and a *decision* is made to continue the pursuit.[6]

---

[6] A simple automobile accident with a police car that is not engaged in a pursuit would not implicate the victim's constitutional rights under this standard. The uniquely governmental function of police pursuits, the fact

These decisions should be made to protect the general public taking into account the risk to the public by the pursuit. When the decision to pursue is made with deliberate indifference to or in reckless disregard of the likely consequences of the pursuit and an injury results, the due process clause has been violated.

While the Third Circuit adopted the "shocks the conscience" test in *Fagan v. Vineland*, 22 F.3d 1292 (3d Cir. 1994), the careful and scholarly dissent by Judge Cowen (joined by three other judges) demonstrates both the limited reach of *Collins* and the inappropriateness of the "shocks the conscience" standard.[7]

As Judge Cowen points out, the Court in *Collins* used the phrase "shocks the conscience" only once, as a characterization of the plaintiff's contention, and only once referred to "conscience-shocking" behavior. *Id.* at 1312. On that occasion the phrase was not used exclusively, but in the disjunctive with "arbitrary." Moreover, the predominant phrase used to assess the substantive due process violation in *Collins* was whether the city's action was "***arbitrary***".

In *Collins*, the Court held: 1) that its "refusal to characterize the city's alleged omission in this case as

---

an intentional decision is made to pursue and the risk of harm distinguish this situation.

7 The Petitioner's reliance on the Third Circuit's decision in *Fagan* as authority that *Collins* mandates the application of the "shocks the conscience" test to all substantive due process cases is questionable due to the recent Third Circuit case of *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996). In *Kneipp*, the Third Circuit declined to apply the "shocks the conscience" test in a substantive due process "state created danger case" and held that the "shocks the conscience" standard was confined to substantive due process police chase cases. *Id.* at 1207-1208.

arbitrary in a constitutional sense rests on the presumption that the administration of Government programs is based on a national decision making process," 503 U.S. at 128; 2) that the petitioner "has not alleged that the deprivation of this liberty interest was arbitrary in the constitutional sense," *Id.* at 129; and 3) that "the city's alleged failure to train and warn did not constitute a constitutionally arbitrary deprivation." *Id.* at 130. It is significant to note that the last substantive sentence of the *Collins* opinion concludes that "the city's alleged failure to train or warn its sanitation department employees was not *arbitrary* in a constitutional sense." *Id.*

No reference to the "shocks the conscience" standard was made in any of these portions of the opinion. It is submitted that if the language used by the *Collins* Court could be read to establish implicitly the standard for proving a substantive due process violation, that standard should be arbitrariness.

Reckless conduct during the course of a high-speed pursuit is tantamount to arbitrary governmental activity. Police pursuits involve the exercise of governmental power through the use of fully marked police vehicles, police sirens and lights as well as laws which permit police officers to violate standard rules of the road when necessary for police business. Black's Law Dictionary defines "arbitrary" as:

> In an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic.

Black's Law Dictionary 104 (6th ed. 1990).

Reckless conduct is established when an actor is aware of an obvious risk that was highly probable to lead to serious harm and proceeded in unreasonable disregard of the consequences. *Fagan*, at 1325. By this definition, reckless conduct during the course of a police pursuit is tantamount to arbitrary governmental activity.

This Court did not establish the "shocks the conscience" test as the substantive due process standard in *Rochin v. California*, 342 U.S. 165 (1952). The use of the phrase "shocks the conscience" in *Rochin* at most indicates that conduct that "shocks the conscience" would suffice to state a claim of constitutional deprivation, it did not hold that this was the standard of proof required for a constitutional violation.

The *Rochin* Court did not inquire into what would be the minimum requirement for establishing a substantive due process violation. Moreover, the "shocks the conscience" test was never used extensively, even in exclusionary rule cases, because of the Court's subsequent decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which established Fourth Amendment standards as controlling in this area. Judge Cowen concluded in *Fagan* on the basis of an inclusive historical analysis that "*Rochin* thus no longer has any relevance in situations analogous to those in *Rochin* itself; it lasts primarily as a source from which people quote the catch phrase 'shocks the conscience.'" 22 F.3d at 1318.

The "shocks the conscience" test is incapable of definition. As even the majority opinion in *Fagan* was obliged to recognize, it involves at best an "amorphous and imprecise inquiry." 22 F.3d at 1308. On the other hand, "reckless disregard" and "deliberate indifference" are standards well-known to the law and subject to sensible definition.

From the inception of the "shocks the conscience" standard in *Rochin*, Justices of this Court have criticized it as a constitutional standard. In Justice Black's concurrence in *Rochin*, he questioned the validity of the "shocks the conscience" standard, arguing that there was no constitutional authority for the Court to decide cases based on its notion of civilized decencies. *Id.* at 176. Further, Justice Black predicted that "the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights." *Id.* at 177. Justice Douglas's concurrence in *Rochin* also questioned the validity of a constitutional "shocks the conscience" test. As Justice Douglas noted, the "shocks the conscience" test will "make the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here." *Id.* at 179.

Just one year after *Rochin*, a plurality of this Court in *Irvine v. California*, 347 U.S. 128 (1953), criticized the *Rochin* Court for failing to analyze the case in terms of "search and seizure" and declined to follow it. *Id.* at 133. In a concurring opinion in *Irvine*, Justice Clark criticized the "shocks the conscience" test:

> [The shocks the conscience test] makes for such uncertainty and unpredictability that it would be impossible to foretell -- other than by guesswork -- just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action a conviction is overturned and a guilty man may go free. *Rochin* bears witness to this.

Id. at 138.

Later, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), Justice Black again criticized the "shocks the conscience" test in his dissent:

> With a "shock the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test willfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics.

Id. at 393.

Even after *Collins*, this Court has criticized the "shocks the conscience test" and questioned its usefulness. As Justice Scalia stated in his concurring opinion in *Herrera v. Collins*, 113 S.Ct. 853 (1993):

> If the system that has been in place for 200 years (and remains widely approved) 'shocks' the dissenters' consciences [citation omitted] perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of 'conscience-shocking' as a legal test.

Id. at 875.[8] The "shocks the conscience" test has also been criticized by Circuit Courts of Appeal over the years.[9]

---

[8] *See also generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U.Chi.L.Rev. 1175 (1989).

[9] For cases criticizing the "shocks the conscience" standard see generally: *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996); *Fagan v. Vineland*, 22 F.2d 1296, 1308-1309 (3rd Cir. 1994); *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994); *Mansfield v. Mansfield*, 988 F.2d 1469, 1478 (6th Cir 1993); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992); *Cassady v. Tackett*, 938 F.2d 693, 697-98 (6th Cir. 1991); and *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990).

In addition to relying upon *Collins*, Petitioner attempts to argue that other workplace safety cases support the application of the "shocks the conscience" standard to substantive due process police chase cases. *See Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995).

As previously argued, *Collins* does not mandate the application of a "shocks the conscience" standard. However, Amicus submits that even if *Collins* and *Uhlrig* do support a "shocks the conscience" standard, it should not be applied in substantive due process police chase cases as these cases are factually inapposite. In *Collins* and *Uhlrig*, the plaintiffs alleged that the failures of their government employers in the workplace amounted to a violation of their substantive due process rights. This Court in *Collins* noted that such claims were unprecedented.

> This Court and the lower courts have been reluctant to expand the protections of the Fourteenth Amendment to employment settings because employment is not a uniquely governmental function. Accordingly, a government employer is not liable for violating an employee's substantive due process rights unless its conduct is so outrageous as to shock the conscience of a civilized society. The "shocks the conscience" standard has been interpreted to require conduct that is so outrageous that very rarely has police conduct been found to meet the standard.

In *Tennessse v.Garner*, 471 U.S. 1 (1985) this Court noted that:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape.

Id. at 11.

If it is unconstitutional to use deadly force on non-dangerous felons, police officers should not have unbridled discretion in pursuing non-dangerous traffic offenders when there is a high probability of serious injury or death. Police pursuits pose a danger to innocent civilians who happen to be in the area of the pursuit as well as to those suspected only of civil motor vehicle infractions. Surely the Constitution should provide as much protection to the right to life of those who are not suspected of criminal wrongdoing as it provides to felony suspects.

Applying constitutional restrictions on the actions of police officers during the course of pursuits is the only way to reduce the number of lives lost during the course of pursuits. Applying a "shocks the conscience" standard does not place any meaningful restrictions on police pursuits. The reality is that when the "shocks the conscience" standard has been applied to police pursuits the actions of the police officers -- no matter how egregious -- fail to reach the amorphous "conscience shocking" level. As a result, police officers are virtually immune from constitutional liability for their actions during a high-speed pursuit.[10]

---

[10] For example, in *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir 1991), the facts were as follows: 1) the officer observed a vehicle squeal its tires while leaving a gas station; 2) the officer pulled behind the vehicle and engaged in a high-speed pursuit; 3) during the course of the pursuit, the officer learned that the suspect was suspected of stealing $17.00 worth of gas; 4) the chase occurred on a narrow two lane road of varying population densities; 5) the speeds of the vehicles in the pursuit ranged from 65 to 105 miles per hour; 6) at the time of the chase, a carnival was taking place and cars were parked on the sides of the road; 7) the chase concluded when the suspect lost control of his vehicle, crashing into the plaintiff's vehicle (an innocent third party); and 8) the police officer was in such hot pursuit that the police vehicle collided with the plaintiff's vehicle at approximately 60 miles per hour. *Id.* at 718. Despite these egregious facts, the police officer's motion for summary judgment was granted because the court held that the actions did not "shock the judicial conscience." Amicus submits that if the foregoing facts do not even create a genuine issue of material fact as to whether the officers' actions "shock the conscience," the "shocks the conscience" standard can never be satisfied and police officers are virtually immune from liability for actions during the course of pursuits.

Given that the "shocks the conscience" test is incapable of definition and does not provide a workable standard within which to analyze substantive due process cases, Amicus submits that it should be expressly rejected as a constitutional standard. On the other hand, the "reckless disregard" or "deliberate indifference" standard is one well-known in civil rights jurisprudence and capable of sensible definition.

Under the "reckless disregard" or "deliberate indifference" standard, law enforcement agencies will properly be held liable for the tragedies that result when their officers participate in high-speed chases in conscious disregard of an obvious risk to human life. Since police officers' primary responsibility is to protect the public and human life, no less should be expected or tolerated.

CONCLUSION

Based on the foregoing argument and reasoning, Amicus respectfully asks this Court to affirm the Ninth Circuit Court of Appeals and hold that the proper standard to be applied in substantive due process police chase cases is reckless disregard or deliberate indifference to the attendant risk of injury or death.

Respectfully submitted,

HOWARD A. FRIEDMAN, ESQ.
90 Canal Street
Boston, Massachusetts 02114
(617) 742-4100
Attorney for Amicus Curiae
The Association of Trial Lawyers of America

October 3, 1997

Supreme Court, U.S.
FILED
OCT 3 1997
CLERK

(14)

No. 96-1337

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, *et al.*,

Petitioners,

vs.

TERI LEWIS, *et al.*,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICI CURIAE* GABRIEL TORRES, NONI ONOSSIAN, CYRIL ONOSSIAN, AND HERVE ONOSSIAN IN SUPPORT OF RESPONDENTS

STEPHEN YAGMAN*
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California 90291-3270
(310) 452-3200

Attorneys for Amici Curiae Gabriel Torres, Noni Onossian, Cyril Onossian, and Herve Onossian

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

TABLE OF CONTENTS

Page

BRIEF OF *AMICI CURIAE* 1

NATURE OF INTEREST 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 3

1. POLICE VEHICLE PURSUITS AIMED AT EFFECTING A FOURTH AMENDMENT SEIZURE OF THE PERSON PROPERLY ARE JUDGED UNDER THE FOURTH AMENDMENT REASONABLENESS STANDARD 3

2. POLICE WHO ENGAGED IN VEHICLE PURSUITS AT THE TIME OF THE PURSUIT IN THIS CASE ARE NOT ENTITLED TO PREVAIL ON THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed. 2d 114 (1994) 5, 7

Collins v. City of Harker Heights, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed. 2d 261 (1992) 5, 7

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed. 2d 662 (1986) 5

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989) 6, 7, 8, 10, 11

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 11

Lewis v. County of Sacramento, 98 F.3d 434 (9th Cir. 1996) 2, 8

Onossian v. Block, 103 F.3d 140 (9th Cir. 1996) (table) 1

Tennessee v. Garner, 471 U.S. 1 (1985) 11

Torres v. Bonilla, 103 F.3d 141 (9th Cir. 1997) (table) 2

OTHER AUTHORITIES

Fourth Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

Gilbert Ryle, *The Concept of Mind*, Hutchinson, 1949, chapt. I, (2) 9

Juvenal (Decimus Iunius Iuvenalis), *Satires*, Book II, No. 6, l. 362 c. A.D. 118 12

BRIEF OF *AMICI CURIAE*

Amici curiae submit this Brief in support of Respondents, and Petitioners and Respondents have consented in writing to the submission of this Brief.

NATURE OF INTEREST

Amici curiae Gabriel Torres, Noni Onossian, Cyril Onossian, and Herve Onossian all were innocent motorists who, while driving in Los Angeles County, California, were hit by vehicles pursued by, respectively, California Highway Patrol officers (Torres),[1] and Los Angeles County Sheriff's deputies (the Onossians).

Each of them was injured very seriously, except Herve Onossian who was moderately injured. Both Noni Onossian and her spouse, Cyril Onossian, suffered permanent physical injuries, including hip replacements, Noni Onossian suffered devastating, deforming facial injuries, and suffers brain damage, and Gabriel Torres lost an eye, is otherwise physically deformed, and suffers from brain damage.

The Onossians' action twice was dismissed, and twice those dismissals were reversed by the Ninth Circuit, *see Onossian v. Block*, 103 F.3d 140 (9th Cir. 1996) (table) (Judges Fernandez, Hawkins, and Schwarzer)[2],

[1] Their counsel, Eric Sawyer, submitted an *amicus* brief in support of the petition for writ of certiorari and on the merits.

[2] The first reversal is unreported in any source.

and recently defendants were granted summary judgment, from which an appeal timely was taken. Torres' action was dismissed, that dismissal was reversed by the Ninth Circuit, *Torres v. Bonilla*, 103 F.3d 141 (9th Cir. 1997) (table) (Judges Fernandez, Hawkins, and Schwarzer), and his action was set for trial on July 29, 1997, when the Ninth Circuit granted defendants' request for a stay of the proceedings pending this Court's disposition of the instant petition.

Because *amici* have a real and significant interest in the disposition of the issues presented to this Court, and because *amici* suggest a disposition that does not appear to have been suggested by the parties or by other *amici*, and present information in their Appendix that apparently otherwise will not be before the Court or be the basis for argument, *amici* respectfully submit this Brief in support of Respondents.

STATEMENT OF THE CASE

Plaintiffs sued Sacramento County and its police officer based on their decedent's demise as the result of a police high speed vehicle chase. Summary judgment was granted to defendants, plaintiffs appealed, and the United States Court of Appeals for the Ninth Circuit reversed that judgment, holding that the claim properly was analyzed under the Fourteenth Amendment due process standard of deliberate indifference and that defendant officer was not entitled to the affirmative defense of qualified immunity. *Lewis v. County of Sacramento*, 98 F.3d 434 (9th Cir. 1996).

The instant certiorari petition followed and was granted on June 2, 1997. ___ U.S. ___, 117 S.Ct. 2406, 138 L.Ed. 2d 173, 65 U.S.L.W. 3798 (1997).

SUMMARY OF ARGUMENT

1. Police vehicle pursuits whose purpose is to stop or to arrest, and the carrying out of which involve a use of force or which cause an injury as a result of a use of force, should be judged not under the Fourteenth Amendment due process clause, but under the Fourth Amendment pursuant to *Graham v. Connor.*

2. No matter which standard this Court selects as the appropriate standard by which to evaluate legally Section 1983 claims that police caused physical injury as the result of a vehicle pursuit, police who engaged in such a pursuit as of the time of the pursuit in this case are not entitled to the affirmative defense of qualified immunity.

ARGUMENT

1. POLICE VEHICLE PURSUITS AIMED AT EFFECTING A FOURTH AMENDMENT SEIZURE OF THE PERSON PROPERLY ARE JUDGED UNDER THE FOURTH AMENDMENT REASONABLENESS STANDARD.

Police pursuits are of epidemic level in Southern California, and very frequently result in violence, death, and injury. *See Not Just Isolated Incidents: The Epidemic of*

Police Pursuits in Southern California, A Report by The ACLU Foundation of Southern California, June 1996, at 1-16. (The full Report is submitted as a separate Appendix with this Brief.)

Of the 1707 pursuits reported upon to the ACLU by the California Highway Patrol for the first year for which such records were kept, 1992, the following data was reported: 12 deaths of suspects; 10 deaths of others, including bystanders; no police deaths; 199 police injured; 374 suspects injured; and 98 others injured. *Ibid.*

Of the 5,766 pursuits reported for the next three years, 1993, 1994, and 1995, the following data was reported: 5.3 pursuits per day; 1 pursuit every 4 hours and 30 minutes; a steady increase of the instances of pursuits; for just 12 of 19 police agencies, 47 deaths, 363 injured officers; 1,240 injured suspects; 314 injured others, including bystanders; and, a rate of 1 injury for every 3 pursuits. *Ibid.*

Amici herein are four wholly innocent bystanders, each of whom had the misfortune to be riding in a vehicle into which crashed at a high rate of speed a vehicle pursued by, respectively, the California Highway Patrol, *amicus* Torres, and the Los Angeles County Sheriff's Department, *amici* Onossians. Three of them, Torres, and two Onossians, were seriously injured, one was horribly disfigured, and one was moderately injured. Torres lost an eye and has brain damage. Noni Onossian and Cyril Onossian both had hip replacements, and Noni Onossian is horribly disfigured.

It is their collective position that this Court determine that the Fourth Amendment correctly provides the

standard under whose provisions harm caused by police vehicle pursuits be measured.

The provisions of 42 U.S.C. § 1983 do not "contain[ ] [any] state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels v. Williams*, 474 U.S. 327, 330, 106 S.Ct. 662, 664, 88 L.Ed. 2d 662 (1986).

Thus, the issue presented on this petition for certiorari is What is the underlying constitutional right that was violated?

It is not the right to substantive due process, as was held by the court below, but it is the right not to be seized unreasonably in violation of the provisions of the Fourth Amendment, and therefore, the state-of-mind requirement in Section 1983 actions based on police vehicle pursuit should be one of "reasonableness."

In *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed. 2d 261 (1992), this Court unanimously held as follows:

> the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered [*sic*] area are scarce and open-ended. [Citation omitted.] The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

In *Albright v. Oliver*, 510 U.S. 266, 271-72, 114 S.Ct. 807, 812, 127 L.Ed. 2d 114 (1994) (plurality), the Chief Justice "beg[a]n analysis of petitioner's claim by repeating [the same] observation in *Collins*[,]" and then stated

that "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity[,]" *ibid.*, and the Court held that a petitioner's "claim to be free from prosecution except on the basis of probable cause is markedly different from those recognized in this group of cases [cognizable under the Fourteenth Amendment]." *Id.*, 510 U.S. 272, 114 S.Ct. 812.

Section 1983 claims founded factually on police vehicle pursuits do not fit comfortably within the Fourteenth Amendment, but fit more comfortably within the Fourth Amendment. Moreover, the standards which govern Fourteenth Amendment claims, *e.g.*, deliberate indifference, conscious disregard, and conduct shocking to the conscience, are all imprecise, open-ended, and subject to varying definitions and interpretations. The Fourth Amendment has but one, reasonably consistently interpreted state-of-mind standard, one of objective reasonableness, and which is both understandable and understood by courts, counsel, and jurors.

This Court's disposition in *Graham v. Connor*, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989), supports this contention.

> Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment[:] . . . [t]his much is clear from our decision in *Tennessee v. Garner*. . . . [A]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of

> an arrest or investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

Moreover, as the Court explained in footnote 10 to the preceding passage, "[a] 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen'. . . . " *Id.* at note 10 (citations omitted).

When, as in the circumstances of this case, "the excessive force claim arises in the context of an arrest or investigatory stop," it is most appropriate, consistent with this Court's precedents, and sensible and non-confusing to use the Fourth Amendment's "reasonableness" state-of-mind standard of conduct. Additionally, as this Court held in *Graham*, because "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts . . . [such as those used in Fourteenth Amendment due process analysis] have no proper place in that inquiry[,]" it is appropriate to utilize the Fourth Amendment "reasonableness" standard, and not the open-ended and confusing Fourteenth Amendment standards in police vehicle pursuit cases.

More and more, *see, e.g., Collins, Albright, supra,* this Court has opted for the concrete, understandable, and

understood, objective standard of "reasonableness" in cases involving police conduct, and there is no reason in fact or in law why this Court either should limit the application of that standard to police conduct that occurs in the context of investigatory stops or arrests, as in *Graham*, or should not readily adopt that standard in cases involving police conduct founded essentially, as here, on attempts to effect an investigatory stop.

The analysis and reasoning of the court below, in concluding that "Lewis's claim as presented to us is properly analyzed under the Fourteenth Amendment[,]" *Lewis v. County of Sacramento*, 98 F.3d 434, 438 (9th Cir. 1996), is seriously flawed.

The standard of culpability to be applied should be derived from the general intent of police to make a Fourth Amendment seizure of the person (here a motor vehicle stop), and not from the specific consequence ("hit[ting] Lewis with his patrol car[,]" *ibid.*) of what is done to effect such a seizure.

The court below bases its choice of the appropriate standard on its incorrect selection of its major premise that "[i]t is undisputed that [defendant] did not intend to hit Lewis with his patrol car." *Id.* at note 3. By doing this, the court below bases its selection of the standard of culpability not on what really was occurring – a motor vehicle stop, which quintessentially is a Fourth Amendment seizure of a person – but rather on the subjective intent of the police officer with respect to *the manner in which to accomplish* a Fourth Amendment seizure of the person.

The correct major premise the court below should have used is that "defendant intended to effect a Fourth

Amendment seizure of the person," and then the correct conclusion that would have followed would have been "Lewis's claim as presented to us is properly analyzed under the *Fourth Amendment*." The means by which defendant police officer chose to effect the seizure should not be the determinative factor on which to base the choice of the constitutional amendment whose provisions govern the police officer's conduct.

But since the police officer *did* use force – his speeding motor vehicle – and *did* intend to effect a Fourth Amendment seizure of the person, and because it was the intentional use of force to effect the seizure that caused physical harm to the decedent, it is the Fourth Amendment that should govern the conduct in issue.

General, intentional conduct (to effect a Fourth Amendment seizure of the person) and the specific means by which it is intended to accomplish that general, intentional conduct (here, for example, by chasing decedent with a police car) are categorically different. The court below made a fundamental category mistake[3] by putting general, intentional conduct as well as the specific means by which it might be sought to effectuate the general intent into the same category. The court below then

---

[3] *See*, Gilbert Ryle, *The Concept of Mind*, Hutchinson, 1949, chapt. I, (2): "It is one big mistake and a mistake of a special kind. It is, namely, a category mistake." A "category mistake," as coined and defined by Ryle, is the inappropriate placement, or conflation, of two different matters into one and the same category, and then the drawing of the same, uniform conclusions about the two different things based on the definition of the category, into which one of the things improperly has been placed.

defined one of the two different elements it incorrectly placed into the same category in terms of the other, categorically mistakenly-placed element. The court below defined general intentional conduct to make a seizure in terms of the means by which that seizure was sought to be accomplished. The court below made the concept of general intent to effect a Fourth Amendment seizure of the person necessarily be defined not in terms of its essence, but rather in terms of its means. This is backwards. The police conduct should be defined and characterized in terms of the forward-looking test of what the officer generally was attempting to accomplish by her or his physical conduct: here, to effect a Fourth Amendment seizure of the person. That force used to make a Fourth Amendment seizure goes awry – "[defendant] did not intend to hit Lewis with his patrol car[,]" 98 F.3d at 438, should not be the defining touchstone for the selection of the appropriate constitutional amendment by which to judge legally conduct used to effect a Fourth Amendment seizure of the person.

When police engage in intentional conduct directed at or "in the context of an arrest or investigatory stop of a free citizen, [that conduct] is most properly characterized as one invoking protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." *Graham*, 490 U.S. at 394, 109 S.Ct. at 1871. This proposition from *Graham* should be determinative of the outcome of this case, and it should matter not which Amendment, the Fourth or the Fourteenth, is the basis for standing to bring the Section 1983 claim.

The nub of the police action is power used under the Fourth Amendment, and therefore, it is the Fourth, and not the Fourteenth, Amendment whose standards should be used to measure the appropriateness or not of that conduct.

2. POLICE WHO ENGAGED IN VEHICLE PURSUITS AT THE TIME OF THE PURSUIT IN THIS CASE ARE NOT ENTITLED TO PREVAIL ON THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY.

A. If police vehicle pursuits are to be judged under the due process clause of the Fourteenth Amendment, then, for the reasons set forth in the opinion of the court below, there is no availability of the affirmative defense of qualified immunity for pursuits that occurred at the time of and after the time of the pursuit in this case.

B. If police vehicle pursuits are to be judged under the Fourth Amendment reasonableness standard, then, there is no availability of the affirmative defense of qualified immunity for pursuits that occurred at the time of the pursuit in this case because, at that time, the law clearly was established that it was unreasonable for police to use excessive force, *see Graham, supra*, or for police to use deadly force in an unreasonable manner. *Tennessee v. Garner*, 471 U.S. 1 (1985).

Moreover, because there were not present any "extraordinary circumstances", *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), there is no availability of qualified immunity.

CONCLUSION

Quite appropriately, American police have available to them a broad array of modes and means by which to accomplish their function of policing, whose quintessential and ultimate goal is to protect the communities which police serve. When police employ forceful modes or means to protect in the course of attempting to effect a Fourth Amendment seizure of the person, and a court then must exercise its function of "guarding the guardians,"[4] it should do so by application of a reasonable, uncomplicated, defined, and serviceable standard.

The Court should hold that Section 1983 claims based on a contention that physical harm resulted from a police vehicle pursuit whose function was to make a Fourth Amendment seizure of the person properly are analyzed under the reasonableness standard of the Fourth Amendment.

Application or expansion of the affirmative defense of qualified immunity to provide a defense to harm caused by police in a vehicle pursuit, or in any other situation, without doing away with the principle that there can be no use of *respondeat superior* to hold liable for damages government entities in Section 1983 actions, is wrongheaded because it strips innocent persons of any ability to redress harm wrongfully inflicted by government. Justice for police and for those whom they harm demands that there be *both* qualified immunity *and respondeat superior* in all Section 1983 actions.

---

[4] *See* Juvenal (Decimus Iunius Iuvenalis), *Satires*, Book II, No. 6, l. 362 (c. A.D. 118): "But who shall guard the guardians?".

In this case, there can be no qualified immunity because, at the time of the pursuit, police knew or reasonably should have known that their conduct in conscious disregard for safety, or in deliberate indifference to safety, or which would shock the conscience, or which was unreasonable, also was unlawful under, respectively, either the Fourteenth Amendment or the Fourth Amendment.

Respectfully submitted,

STEPHEN YAGMAN
(Counsel of Record)
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, CA 90291-3270
(310) 452-3200

Attorneys for Amici Curiae

September 8, 1997

MOTION FILED
OCT - 3 1997,

No. 96-1337 (15)

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO,
SACRAMENTO COUNTY SHERIFF'S DEPARTMENT,
JAMES EVERETT SMITH,

Petitioners,

v.

TERI LEWIS AND THOMAS LEWIS,
Personal Representatives of the Estate
of Philip Lewis,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME AND BRIEF ON THE MERITS OF AMICUS CURIAE GRAND LODGE OF THE FRATERNAL ORDER OF POLICE IN SUPPORT OF NEITHER PARTY AND URGING REVERSAL

THOMAS T. RUTHERFORD
Chief Legal Counsel to the Grand Lodge of the Fraternal Order of Police
320 Gold Street S.W.
Suite 1000
Albuquerque, New Mexico 87103
505-842-6700

GARY LIGHTMAN
Counsel of Record
2705 North Front Street
Harrisburg, PA 17110
717-234-0111

WILLIAM J. FRIEDMAN
Litigation Counsel for FOP
P.O. Box 2147
Santa Fe, New Mexico 87504
505-989-9800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME

Amicus, Grand Lodge of the Fraternal Order of Police, and pursuant to Rule 37 respectfully requests this court accept as timely the attached brief. As grounds counsel states:

1. Amicus FOP was unable to determine the propriety of its participation as amicus in the instant case until at or near the time of filing of Petitioner's Brief in Chief in August 1997.

2. Amicus has submitted with its brief on the merits, signed consent forms from all parties.

3. Amicus faxed a copy of this request to counsel for Petitioners and counsel for Respondent and has spoken with both counsel and there is no opposition from either counsel regarding acceptance of this brief as timely filed.

4. Amicus specifically informed Respondent's counsel of the contentions advanced in the brief and Respondent's counsel did not perceive a need to reply to any of the contentions and therefore believed his client suffered no prejudice.

5. In the absence of prejudice to opposing parties or opposition from their counsel, acceptance is favored and will facilitate review on the merits.

6. Amicus is a national police organization with over 275,000 members and brings to the Court's attention relevant matter not already brought to the attention of the Court as well as a perspective that is not limited solely to the advocacy of the instant case.

WHEREFORE, for the foregoing reasons Amicus FOP repectfully requests this Court grant the motion for leave to file Amicus Brief.

Respectfully submitted,

Counsel of Record for Amicus FOP
GARY LIGHTMAN, Esquire
2705 N. Front Street
Harrisburg, PA 17110
(717) 234-8964

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 3

Part I: This Case Should Be Evaluated Under the Fourth Amendment Rather than the Fourteenth Amendment and No Duty Arising Under the Fourth Amendment Exists or was Violated 4

Part II: No Fourteenth Amendment Claim is Stated on the Facts of This Case 9

A. There is No Constitutional Duty Arising Under the Fourteenth Amendment in This Case 10

1. *The Fourteenth Amendment Imposes No Duty to Provide Criminal Suspects Such as Lewis, with Minimal Levels of Safety and Security During a High Speed Chase* 11

2. *If a Duty Exists Under the Fourteenth Amendment to Provide Criminal Suspects Such as Lewis, with Minimal Levels of Safety and Security During A High Speed Chase, Violation of that Duty Requires a Showing of Intentional Misconduct Directed at Depriving a Citizen of that Protection* 16

TABLE OF CONTENTS – Continued

Page

Part III: If Car Accidents In Police Chases Give Rise to a Bystander's Fourteenth Amendment Claim, the "Shocks the Conscience" Standard Can Retain its Force Only if it is Sufficiently Developed by Reference to Standards Developed in Other Constitutional Jurisprudence 18

A. Shocks the Conscience Jurisprudence 19

B. Eighth Amendment Jurisprudence 21

1. *Applying Excessive Force Standards to Police Chases: Intent to Harm* 21

2. *Applying the Conditions of confinement Standards to Police Chases: Subjective Recklessness* 23

Part IV: The Ninth Circuit Decision Erroneously Assumed a Constitutional Violation had Occurred and Applied the Wrong Standard of Conduct to that Assumed Violation 26

V. Conclusion 29

TABLE OF AUTHORITIES

Page

CASES CITED:

Albright v. Oliver, 510 U.S. 266 (1994)..... *passim*

Baker v. McCollan, 443 U.S. 137 (1979)..4, 11, 14, 15, 16

Bell v. Burson, 402 U.S. 535 (1971)..... 17

Boddie v. Connecticut, 401 U.S. 371 (1971)..... 20

Brinegar v. United States, 338 U.S. 160 (1949)..... 15

Brower v. County of Inyo, 489 U.S. 593 (1989) 2, 7, 8, 10, 18

California v. Hodari D, 499 U.S. 621 (1991) 7, 8, 9, 23

Cannon v. Taylor, 782 F.2d 947 (11th Cir. 1986)..... 9

City of Canton v. Harris, 489 U.S. 378 (1989) 17, 26, 27, 28

Collins v. City of Harker Heights, 503 U.S. 115 (1982) ..... *passim*

Daniels v. Williams, 474 U.S. 327 (1986)..... *passim*

Davidson v. New Orleans, 96 U.S. 97 (1878) 16

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 2, 16

Estelle v. Gamble, 429 U.S. 97 (1976) 11, 14, 28

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996)..... 23

Fagan v. City of Vineland, 22 F.3d 1296 (3rd Cir. 1994)..... 4

Farmer v. Brennan, 511 U.S. 825 (1994)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Gerstein v. Pugh, 420 U.S. 103 (1975) 5, 13

Graham v. Connor, 490 U.S. 386 (1989) ... 4, 5, 6, 12, 19, 22

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 22

Hill v. California, 401 U.S. 797 (1971) 12

Hudson v. Palmer, 468 U.S. 517 (1984) 17, 20

Ingraham v. Wright, 430 U.S. 651 (1977) 9, 10, 17

Irvine v. People, 347 U.S. 128 (1953) 20

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 25

Kansas v. Hendricks, No. 95-1649 (1997) 25

Lewis v. Sacramento, 98 F.3d 434 (9th Cir. 1996) 4

Mapp v. Ohio, 367 U.S. 643 (1961) 19

Martinez v. California, 444 U.S. 277 (1980) 16

Maryland v. Wilson, No. 95-1268 (1997) 12, 27

Medina v. California, 505 U.S. 437 (1992) 13

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 27, 28

Ohio v. Robinette, 519 U.S. ___ (1996) 8

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 17

Parratt v. Taylor, 451 U.S. 527 (1981) 3, 11, 16, 30

Patterson v. New York, 432 U.S. 197 (1977) 13

Paul v. Davis, 424 U.S. 693 (1976) 3, 11, 14, 16

TABLE OF AUTHORITIES – Continued

Page

Pembaur v. Cincinatti, 475 U.S. 469 (1986) 17

Rochin v. California, 342 U.S. 165 (1952) 4, 10, 15, 16, 19, 22

Soldal v. Cook County, 506 U.S. 56 (1992) 19

Tennessee v. Garner, 471 U.S. 1 (1985) ..... *passim*

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 6, 7, 13, 18

United States v. Lanier, No. 95-1717 (1997) 15

Washington v. Glucksberg, No. 96-110 (1997) 27

Weeks v. United States, 232 U.S. 383 (1914) 20

Whitley v. Albers, 475 U.S. 312 (1986) 3, 5, 6, 19, 22

Whren v. United States, 517 U.S. ___ (1996) 8

Wolf v. Colorado, 338 U.S. 25 (1949) 20

STATUTES CITED:

28 U.S.C. §§ 2671-2680 24

AMENDMENTS CITED:

Fourth Amendment ..... *passim*

Eighth Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

OTHER AUTHORITIES CITED:

Americal Law Institute, Model Penal Code, Section 2.02(2)(C) 1985 17

TABLE OF AUTHORITIES – Continued

Page

Automobiles and Highway Traffic, 8 Am. Jr. 2d § 754 12

Liability of Government Unit or its Officers for Injury to Innocent Occupant of Moving Vehicle, or for Damage to such Vehicle, as a Result of Police Chase, 4 A.L.R.4th 865 12

W. LaFave & A.Scott *Substantive Criminal Law* § 3.7, p. 335 24

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* §§ 2, 34, pp. 6, 213-214 24

BRIEF ON THE MERITS OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE[1]

Amicus Grand Lodge of the Fraternal Order of Police (hereinafter "FOP") is a non-profit corporation created to represent the interests of its members including participation as Amicus before this Court in matters that affect FOP members and in which the FOP has unique expertise and insight. The FOP's membership is open to and includes Federal, State, County, Local and Campus law enforcement personnel that are regularly appointed and full-time law enforcement officers. The FOP has nearly three hundred thousand members whose employment responsibilities include authorization to engage in pursuit of suspects as occurred in the case before the Court.

The interests Amicus FOP seeks to illuminate in this proceeding are germane to the organization's purpose and its members' interests as well as those of the public in general. The Grand Lodge has historically sought and been granted Amicus status when issues impacting the terms and conditions of employment of its members are identified. The FOP is keenly interested in the instant case because multiple standards have been used by the various federal courts to determine if police officer conduct in a pursuit situation is constitutionally permissible. Currently an officer has one standard of conduct for the use of force articulated by this Court's Fourth Amendment jurisprudence and two different standards articulated by the several Courts of Appeals in Fourteenth Amendment jurisprudence. The advocates in the instant

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

case have strong reasons to litigate this case narrowly while the FOP can present relevant matter not already brought to the attention of the Court as well as a perspective that examines equally the instant case and the future applications of its principles.

SUMMARY OF ARGUMENT

I. This case should be analyzed under the Fourth Amendment rather than the Fourteenth Amendment pursuant to this Court's opinions in *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989) and *Brower v. County of Inyo*, 489 U.S. 593 (1989). Reliance on the substantive component of the Fourteenth Amendment is foreclosed where the decedent was a suspect being chased by the police and his death arose from the inadvertent force used in the seizure. No claim is stated on the instant facts under the Fourteenth Amendment. *See also Albright v. Oliver*, 510 U.S. 266 (1994) (finding Fourth Amendment rather than Fourteenth sets standard).

II. Assuming Respondent Lewis was a non-suspect under the Fourth Amendment, there is no Fourteenth Amendment duty, independent of that articulated by the Fourth Amendment, running from the police to him. The substantive component of the Due Process Clause is intended to protect against intentional government action that arbitrarily deprives citizens of fundamental rights rather than shield them against negligent or grossly negligent conduct. *Collins v. Harker Heights*, 503 U.S. 115, 126-27 (1982); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989); *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (Historically the clause has operated against "deliberate decisions" of government officials to deprive a person of life, liberty, or property). Accidental injuries to non-suspect citizens resulting from force used by police in chasing

or apprehending suspects do not give rise to Fourteenth Amendment claims under Section 1983. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981) ("party who is involved in nothing more than an automobile accident with a state official" has no constitutional claim); *Paul v. Davis*, 424 U.S. 693, 698 (1976) ("survivors of an innocent bystander . . . negligently killed by a sheriff driving a government vehicle" have no constitutional claim).

III. Alternatively, if injuries from an automobile accident arising out of a police chase may be the predicate for a Due Process Clause claim pursuant to Section 1983, personal liability should not attach to a police officer's conduct until it demonstrates a level of indifference equal to that required under this Court's Eighth Amendment excessive force cases or alternatively, the level of indifference required in its conditions of confinement cases. *See Farmer v. Brennan*, 511 U.S. 825, 835-40 (1994) (discussing subjective recklessness); *Daniels v. Williams*, 427 U.S. at 334 (noting Section 1983 does not impose state of mind requirement but underlying constitutional right may).

ARGUMENT

In 1986 this Court reserved the question "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Daniels*, 474 U.S. at 334 n.3; *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (noting the reservation of question in *Daniels*). The Ninth Circuit opinion in this case held that conduct demonstrating "deliberate indifference to or in reckless disregard of a person's Fourteenth Amendment rights" triggers the protections of the Due Process Clause. JA/46-60. The Circuit courts are split, in the context of a high-speed police

chase, whether an officer's conduct must be "recklessly indifferent" to the personal security of citizens subsequently injured by the chase or is limited to injuries arising out of officer conduct that "shocks the conscience" of the Court. *See Rochin v. California,* 342 U.S. 165 (1952) (noting conduct shocks the conscience); *Compare e.g. Lewis v. Sacramento,* 98 F.3d 434 (9th Cir. 1996) (JA/46-60) with *Fagan v. City of Vineland,* 22 F.3d 1296 (3rd Cir. 1994) (en banc) (overruling previous reckless indifference standard and adopting shocks the conscience standard).

I. This Case Should be Evaluated Under the Fourth Amendment Rather than the Fourteenth Amendment and No Duty Arising Under the Fourth Amendment Exists or was Violated.

This Court has repeatedly held that Section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver,* 510 U.S. 266, 271 (1994) citing *Baker v. McCollan,* 443 U.S. 137, 144, n. 3 (1979). The first step in any Section 1983 claim is to identify the specific constitutional right allegedly infringed. *Graham v. Connor,* 490 U.S. 386, 394 (1989); *Baker v. McCollan,* at 140.[2] It is undisputed between the

[2] Plaintiffs brought a claim in California State court on behalf of their deceased son alleging a deprivation of rights secured by the Fourteenth Amendment to the United States Constitution. JA/1; Complaint at Para. 1 (defendants violated "certain rights guaranteed under the United States Constitution . . .). The complaint alleged Deputy Smith "operated his vehicle in a reckless and careless manner . . . ". Comp. Para. 4 And that he, "operated his vehicle with

parties and the court that Lewis' claim is advanced under the Due Process Clause.

This court has thrice expressly rejected substantive due process claims as improvidently advanced. *See Albright v. Oliver,* 510 U.S. 266 (1994) (holding Fourth Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" claim advanced); *Graham v. Connor,* 490 U.S. 386 (resolution of due process claim of excessive force by reference to the Fourth Amendment's prohibition against unreasonable seizures of the person); *Whitley v. Albers,* 475 U.S. 312, 327 (1986) (Court resisted relying on the Due Process Clause when doing so would have duplicated protection that a more specific constitutional provision already bestowed.); *see also Gerstein v. Pugh,* 420 U.S. 103 (1975). Finally, in *Tennessee v. Garner,* 471 U.S. 1, 5, this Court relied exclusively on the Fourth Amendment to resolve a complaint that alleged, *inter alia,* the suspect's shooting was a violation of the Fourteenth Amendment.

recklessness, gross negligence and conscious disregard for his [Lewis'] safety. These actions were taken with willful and wanton disregard for the constitutional rights of the decedent Philip M. Lewis," Comp. Para. 18. In Count II the complaint alleged the Sheriff's Department failed to train Deputy Smith and that such failure "amounted to a deliberate indifference to the rights of those using the public highways," because the failure would obviously lead to "violation of constitutional rights". Comp. Para. 21. By failing to train Deputy Smith, the Sheriff's Department was "grossly negligent, reckless and [engaged in] intentional acts and omissions," (Comp. Para. 25) that "deprived Decedent Philip M. Lewis of his fourteenth Amendment right to life, liberty and property without due process." Comp. Para. 23. The foregoing describes the sum of the constitutional allegations. The third count alleged garden-variety negligence. Comp. Para's. 26-32.

In *Graham v. Connor,* the complaint alleged violations of both the Fourth Amendment and the substantive component of the Due Process Clause. 471 U.S. at 5. The court analyzed the constitutionality of the challenged application of force by reference to the Fourth Amendment solely. Id. at 7-8. The Court reasoned:

> [b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

490 U.S. at 395. The *Graham* Court further buried the Due Process Clause avenue of relief by noting that the Fourth Amendment's prohibition against unreasonable seizures of the person and the Eighth Amendment's ban on cruel and unusual punishments are the two primary sources of constitutional protection against physically abusive governmental conduct.[3] *Graham* 490 U.S. at 394. While not foreclosing a Fourteenth Amendment claim for physically

---

[3] In *United States v. James Daniel Good Real Property,* 510 U.S. 43, 50 (1993) the Court explained that the Fourth Amendment, "balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases. (citation omitted). *See Garner,* 471 U.S. at 7 (" . . . there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."); *Whitley v. Albers,* 475 U.S. at 327 (in context of prison riot the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause.); *Harker Heights,* 503 U.S. at 129 (The Due Process Clause does not "guarantee municipal employees a workplace that is free of unreasonable risks of harm.")

abusive government conduct, this Court placed its focus on the most applicable textual provision and held:

> [A]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment . . .

490 U.S. 395.[4]

It is the Fourth Amendment that affords known jurisprudential boundaries to questions of whether police pursuit is properly conducted. *Tennessee v. Garner.*

In the instant case the following facts are salient. Lewis was being chased by police as a criminal suspect and refused to yield to a lawful exercise of authority. *See* JA/48-49; *California v. Hodari D.,* 499 U.S. 621, 624 (1991) (show of authority does not constitute seizure); *Brower v. Inyo County,* 489 U.S. 593, 596 (1989) (same). The complaint alleges it was Lewis' motorcycle, that he and Willard were "speeding" and that Deputy Smith "gave chase." Comp. Para. 13 (speeding); Para. 13 (officer gave chase); Para. 19 (noting Lewis' motorcycle). Lewis and Willard violated several traffic laws during the chase. JA/83-85. The pursuing officer believed the public at risk.

---

[4] Perhaps in the unlawful seizure context exemplified by this case there is no need to differentiate between a so-called Fourth Amendment theory and a substantive due process theory because they are coextensive. *Albright v. Oliver,* 510 U.S. 309 (Stevens, J. dissenting). Certainly the Fourth Amendment's right to be "secure . . . in their persons" and the Fourteenth Amendment's right to be deprived of "life [and] liberty" only upon due process can be seen as protecting the substantive interest. *See also United States v. James Daniel Good Real Property,* 510 U.S. at 49-52 (noting applicability of Fourth Amendment does not foreclose reliance on other amendments).

JA/84-85. After losing control of his motorcycle, Lewis was struck by the pursuing police car. JA/73.

It is apparent that the rule of *Brower v. Inyo County*, 489 U.S. at 599 (seizure occurs when person stopped by "the very instrumentality set in motion or put in place in order to achieve that result."), must be modified to accommodate the weakness of the analogy between the roadblock in *Brower* (or the gun in *Garner*) and Deputy Smiths' vehicle in the instant case. A gun (or roadblock) that is directed at a suspect for the express purpose of seizing the suspect, is an intentional use of deadly force to "seize" the suspect. A vehicle used in a pursuit scenario is not an analog of the *Garner* gun nor *Brower* roadblock because it is not the "very instrumentality" designed to achieve the seizure. The Fourth Amendment duty in the instant case is to not use the vehicle intentionally as an instrumentality to effect the seizure. In short, the vehicle must be used like a weapon with the intent it be used like a weapon to run afoul of the duty set forth in *Brower* and *Garner*. *See also California v. Hodari D.*, 499 U.S. at 626 (no seizure when suspect continues to flee); *see also Whren v. United States*, 517 U.S. ___ (1996) (traffic violation permissible basis for stop regardless of officer's subjective motivation); *Ohio v. Robinette*, 519 U.S. ___, ___ (1996) (noting speeding constitutes probable cause to stop).

Based on the facts of record and this Court's Fourth Amendment jurisprudence, it would appear inescapable that the entire scenario involving Lewis is a garden-variety Fourth Amendment case resulting in an unfortunate and *accidental* seizure by deadly force at the conclusion. *Tennessee v. Garner*, 471 U.S. 1 (1985); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *California v. Hodari*

D., 499 U.S. 621, 626 (1991). An intentional act by pursuing officers that does not get the suspect to cease fleeing is no seizure. An unintentional act that stops the suspect's fleeing, even by deadly force causing death, states no violation of the duties imposed by *Garner* and *Brower*. The show of authority represented by the lights, siren and chasing of Lewis place this case squarely within the ambit of duties set forth in *Brower* and *Garner* and the *accidental* application of deadly force makes it equally clear that no Fourth Amendment duty was violated. Lewis was a suspect and his claim should be evaluated under the Fourth Amendment rather than the substantive component of the Due Process Clause and no violation of constitutional duty is stated.

II. No Fourteenth Amendment Claim is Stated on the Facts of This Case[5]

Lewis claims Deputy Smith violated Smith's duties under the Fourteenth Amendment, *see* fn 1 herein (review of decedent's complaint), by initiating and executing a high speed chase in a manner that was recklessly indifferent to Lewis' right of personal security.[6] *See Ingraham v.*

---

[5] The Due Process Clause of the Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." *Compare Cannon v. Taylor*, 782 F.2d 947, 949 (11th Cir. 1986) ("Although the right to life is an interest of constitutional dimension, not every deprivation of life amounts to a constitutional violation and gives rise to a claim under section 1983.").

[6] The Respondents made no claim of a violation of fourth Amendment rights, notwithstanding the fact that Lewis was apparently seized by Officer Smith for purposes of the Fourth Amendment at the time of the accident. *Albright v. Oliver*, 510

Wright, 430 U.S. 651, 673 (1977) ("Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security).

This Court has never affirmatively held that "something less than intentional conduct" will trigger the protections of the substantive component of the due process clause. *Daniels*, 474 U.S. at 334 n.3; *see also Rochin v. California*, 342 U.S. 165 (1952) (finding conduct "conscience shocking"). The Ninth Circuit in the instant case held that "deliberate indifference" or "reckless disregard" will trigger the protections of the substantive due process clause. JA/54. Before turning to the substantive, constitutional standard of conduct question, this Court's cases require the constitutional duty allegedly violated be identified. *Collins v. Harker Heights*, 503 U.S. at 120 (determining whether constitutional duty is owed prior to determining whether violation of duty occurred).

A. There is No Constitutional Duty Arising Under the Fourteenth Amendment in This Case

The complaint does not charge Deputy Smith with an intentional violation of Lewis' rights. Instead, it advances two theories: that the Federal Constitution imposes a duty on the Deputy Smith to provide criminal suspects with minimal levels of safety and security during a high speed chase, and that Smith's "deliberate indifference" to Lewis' safety and security during the chase was arbitrary Government action subject to liability under Section 1983. *See Collins v. Harker Heights*, 503 U.S. 115, 125-26 (1992)

U.S. 266, 271; *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

(determining whether constitutional duty is owed before reaching question of applicable standard of conduct).

1. The Fourteenth Amendment Imposes No Duty to Provide Criminal Suspects Such as Lewis, with Minimal Levels of Safety and Security During a High Speed Chase

Lewis' claim that Deputy Smith failed to provide certain minimal levels of safety and security during a police chase is, like the claim advanced in *Collins v. Harker Heights*, "unprecedented". 503 U.S. at 127. It is quite different from the Fourteenth Amendment claims recognized in this Court's prior cases where the State owes a duty to take care of those who have already been deprived of their liberty. *See Collins v. Harker Heights*, 503 U.S. at 127 (collecting prisoner and suspect apprehension cases). That duty includes a continuing obligation to satisfy certain minimal custodial standards. 503 U.S. at 128. In the context of a fleeing suspect pursued by police, neither the suspect nor a bystander are in custody.

This Court has previously noted in dicta that automobile accidents would not be constitutional in nature merely because one of the drivers is a government official. *See Parratt v. Taylor*, 451 U.S. 527, 544 (party who is involved in nothing more than an automobile accident with a state official has no constitutional claim); *Paul v. Davis*, 424 U.S. at 698 ("survivors of an innocent bystander . . . negligently killed by a sheriff driving a government vehicle" have no constitutional claim). Similar holdings in other contexts exist. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner,"); *Baker v. McCollan*, 443 U.S. 137, 146

(1979) ("false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official."); *see also* 4 A.L.R.4th 865 Annotation: *Liability of Governmental Unit or its Officers for Injury to Innocent Occupant of Moving Vehicle, or for Damage to such Vehicle, as a Result of Police Chase* (police vehicles are exempted generally from the operation of certain traffic regulations); 8 Am. Jur. 2d, Automobiles and Highway Traffic § 754. Another way of saying the same thing is that an accident involving a vehicle operated by a state actor, no matter how extreme the negligence, cannot trigger the protections of the due process clause.

Second, the Due Process Clause does not address the standard for initiating or continuing the apprehension of a suspect. Any "duty" to "seize" suspects such as Lewis in a particular manner arises out of the Fourth Amendment and not the Fourteenth. *See Graham v. Connor,* 490 U.S. at 395 (all claims of excessive force by law enforcement officials in the course of a seizure should be analyzed under the Fourth Amendment's reasonableness standard) (internal quotations omitted). This Court has twice determined that the constitutionally valid exercise of the coercive police power that is regulated by the Fourth Amendment, when accidentally misdirected towards an apparently innocent third party, does not run afoul of the Fourth Amendment's reasonableness standard. *See Maryland v. Wilson,* No. 95-1268 (1997) (where stop is valid exercise of police authority, police may lawfully detain passenger and order passenger out of car despite absence of particularized suspicion); *Hill v. California,* 401 U.S. 797 (1971) (where probable cause existed to arrest a citizen and the wrong citizen is erroneously arrested no Fourth Amendment violation arises); *see also*

United States v. James Daniel Good Real Property, 510 U.S. 43, 50 (1993) (explaining that *Gerstein v. Pugh,* 420 U.S. 103, 125 n. 27 (1975) held the Fourth Amendment balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases.) The Fourteenth Amendment does not supplant the duties under the Fourth Amendment, and does not independently regulate the conduct of police officers seeking to apprehend a suspect.

Locating a duty in the substantive component of the Due Process Clause to avoid car accidents runs counter to several other substantive and prudential doctrines of this Court. First, the failure to ensure suspects will not be involved in car accidents when fleeing police does not "offend[s] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California,* 505 U.S. 437, 445 (1992) (quoting *Patterson v. New York,* 432 U.S. 197, 202 (1977)). Avoidance of car accidents is not a fundamental right.

Second, there can be no doubt that if the driver in this case were not a police officer but some other government worker, a garden-variety tort would exist that would not implicate constitutional rights. *See Parratt v. Taylor,* 451 U.S. 527, 548 (1981) (Powell, J., concurring in result) (where a government official's act causing injury to life, liberty, or property is merely negligent "no procedure for compensation is constitutionally required."); *see also* fn 1 herein (discussing allegations in complaint); *Collins v. City of Harker Heights,* 503 U.S. at 128 (noting Due Process Clause, "does not purport to supplant traditional tort law in laying down rules of conduct to regulate

liability for injuries that attend living together in society" citing *Daniels v. Williams*, 474 U.S. at 332); *accord Baker v. McCollan*, 443 U.S. 137, 146 (1979) (Fourteenth Amendment does not impose federal duties that are analogous to those traditionally imposed by state tort law); *Paul v. Davis*, 424 U.S. 693, 701 (1976). To permit constitutional litigation over automobile accidents creates federal duties that duplicate state duties and replaces well settled tort law with federal tort law.

Third, the Court should find no Section 1983 claim arises out of the Fourteenth Amendment because to do so would create two unacceptable constitutional anomalies. If force intentionally directed at a suspect that is permissible under the Fourth Amendment can simultaneously give rise to a Section 1983 claim by a non-suspect allegedly injured by the force directed at the suspect, then police officers must conform their conduct to conflicting standards.

> The importance of recognizing the latter limitation is underscored by pragmatic concerns about subjecting government actors to two (potentially inconsistent) standards for the same conduct and needlessly imposing on trial courts the unenviable burden of reconciling well established jurisprudence under [two different amendments].

Albright v. Oliver, 510 U.S. at 287-288 (Souter, J., concurring). This anomaly contains a further problem in that the force directed at the suspect, when misdirected accidentally or fortuitously to a non-suspect, is manifestly force directed at the non-suspect by an error or mistake. *See Estelle v. Gamble*, 429 U.S. at 103-104 (distinguishing negligence or mistake from deliberate indifference).

> Whatever claims this situation might give rise to under state tort law, we think it gives rise to no claim under the United States Constitution. Respondent was indeed deprived of his liberty for a period of days, but it was pursuant to a warrant conforming, for purposes of our decision, to the requirements of the Fourth Amendment.

Baker v. McCollan, 443 U.S. at 144 (acknowledging police arrested and jailed wrong person but Fourth Amendment provides no relief). No constitutional duty exists to avoid mistakes, even mistakes that manifestly deprive of liberty as in *Baker v. McCollan*. Permissible actions taken under the Fourth Amendment cannot become, when viewed through the lens of the Fourteenth Amendment, violations of some as yet undefined constitutional right. *See, e.g., United States v. Lanier*, 95-1717 (1997) (rejecting view that "fair warning" under criminal law requires more than "well established" under qualified immunity analysis). Force used in activities regulated by the Fourth Amendment must be judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Baker v. McCollan*, 401 U.S. at 805 citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

The second anomaly arises because an independent duty arising out of the Fourteenth Amendment is usually breached only upon a showing of conduct that "shocks the conscience" whereas the Fourth Amendment duty is violated upon a showing of objective unreasonableness. *Compare Tennessee v. Garner* with *Rochin v. California*. Currently, a criminal suspect injured by the same police conduct that injures a non-suspect citizen has a lesser constitutional burden to overcome for a Section 1983

claim than does a non-suspect citizen. Nothing in this Court's prior *substantive due process* jurisprudence holds or even suggests that a duty exist to conduct chases of criminal suspects in a manner that protects the personal security of the fleeing suspect. The Fourth Amendment and not the Fourteenth place affirmative duties on police officer conduct when chasing suspects.

2. *If A Duty Exist Under the Fourteenth Amendment to Provide Criminal Suspects, Such as Lewis, with Minimal Levels of Safety and Security During a High Speed Chase, Violation of that Duty Requires a Showing of Intentional Misconduct Directed at Depriving a Citizen of that Protection.*

This Court has repeatedly issued limited holdings and constraining dicta regarding claims advanced under the substantive component of the Due Process Clause. *Albright v. Oliver,* 510 U.S 288 (Souter, J., concurring) (noting clause is for "otherwise homeless substantial claims"). And this court has said many times that the Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation." *See DeShaney v. Winnebago County Dept. of Social Servs.,* 489 U.S. 189, 202 (1989); *Daniels v. Williams,* 474 U.S. at 335-336; *Parratt v. Taylor,* 451 U.S. 527, 544 (1981); *Martinez v. California,* 444 U.S. 277, 285 (1980); *Baker v. McCollan,* 443 U.S. 137, 146 (1979); *Paul v. Davis,* 424 U.S. 693, 701 (1976).

Historically the clause has operated against "deliberate decisions" of government officials to deprive a person of life, liberty, or property. *See Daniels v. Williams,* 474 U.S. at 332; *Davidson v. New Orleans,* 96 U.S. 97 (1878) (assessment of real estate); *Rochin v. California,* 342 U.S. (1952)

(stomach pumping); *Bell v. Burson,* 402 U.S. 535 (1971) (suspension of driver's license); *Ingraham v. Wright,* 430 U.S. 651 (1977) (paddling student); *Hudson v. Palmer,* 468 U.S. 517 (1984) (intentional destruction of inmate's property).

Even in cases such as *City of Canton v. Harris,* 489 U.S. 378 (1989) and *Collins v. Harker Heights* this Court equated the "reckless indifference" to a known need to train municipal employees with a policy of endorsing the alleged constitutional violation because the "policy" of non-training "caused" the constitutional deprivation. *Canton v. Harris* at 389; *Collins v. Harker Heights,* at 503 U.S. 123. Deliberate indifference is tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes. *Compare Pembaur v. Cincinatti,* 475 U.S. 469, 483 (1986) (plurality opinion of Brennan, J.) ("deliberate choice" by policymaker) and *Oklahoma City v. Tuttle,* 471 U.S. 808, 823 (1985) (plurality opinion of Rehnquist, J.) (" 'policy' generally implies a course of action consciously chosen") with *Canton,* 489 U.S. at 389 ("Only where a municipality's failure to train its employees . . .- evidences a 'deliberate indifference' to the rights of its inhabitants can . . . a shortcoming be . . . city 'policy or custom' . . . actionable under § 1983"); *see, e.g.,* American Law Institute, Model Penal Code § 2.02(2)(c) (1985).

In light of the foregoing review of this Court's substantive due process cases, absent a showing that the government actor intentionally violated a duty imposed by the Fourteenth Amendment, no claim can be stated. In the instant case the record is unequivocal: Deputy Lewis

did not act intentionally with respect to the alleged deprivation of Lewis' rights. *See* JA/50 ("It is undisputed that Smith did not intend to hit Lewis with his patrol car."). Moreover, Deputy Smith braked hard before the unfortunate impact. JA/49 (court noting braking distance). Deputy Smith did not act intentionally when he was unable to stop in time to avoid colliding with Lewis and any error in judgment or driving does not trigger the protections of the Due Process Clause.

III. If Car Accidents in Police Chases Give Rise to a Bystander's Fourteenth Amendment Claim, the "Shocks the Conscience" Standard Can Retain its Force Only if it is Sufficiently Developed by Reference to Standards Developed in Other Constitutional Jurisprudence.

If an automobile accident involving police and a non-suspect bystander triggers the protections of the due process clause, this Court should forego further application of the "shocks the conscience" test in favor of those standards of conduct applicable in Eighth Amendment settings and determined coextensive or overlapping with substantive due process protections.[7] *See Albright v. Oliver*, 510 U.S. at 287 (Souter, J., concurring); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 ("We have rejected the view that the applicability of one

[7] Use of this standard is appropriate despite the fact that Section 1983 imposes no state of mind requirement. *See Daniels*, 474 U.S. at 334 (noting underlying constitutional right may define state of mind requirement); *Brower*, 489 U.S. at 601, (Stevens, J. concurring) ("There may be a case that someday comes before this Court in which the concept of intent is useful in applying the Fourth Amendment.")

constitutional amendment preempts the guarantees of another"); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) ("it would indeed be surprising if conduct that shocks the conscience or afford[s] brutality the cloak of law, and so violates the Fourteenth Amendment were not also punishment inconsistent with contemporary standards of decency and repugnant to the conscience of mankind, in violation of the Eighth" (internal quotations and citations omitted)); *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). Because the Fourteenth Amendment has been previously held coextensive with Eighth Amendment protections, application of the standards developed in custodial settings provide useful guidance in this area of otherwise uncharted constitutional jurisprudence.

A. Shocks the Conscience Jurisprudence

The anecdotal phrase "shocks the conscience" first appeared in *Rochin v. California*, 342 U.S. 165, 172 (1952) and was used to impose the Fourth Amendment exclusionary rule upon the states in criminal cases, without overruling a previous decision stating that the Fourth Amendment exclusionary rule does not apply to state proceedings for state crimes.[8] Since *Rochin*, the Supreme Court has never explicitly employed the "shocks the conscience" test as part of its holding in any case.

Rochin involved forcible pumping of a suspect's stomach to obtain evidence eventually used to convict the defendant. 342 U.S. at 166-68. Apparently unwilling to

[8] The "shocks the conscience" standard was subsequently repudiated in cases that most closely resembled the facts of *Rochin*. *See Mapp v. Ohio*, 367 U.S. 643 (1961); *Graham v. Connor*, 490 U.S. 386 (1989).

reverse *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court applied the Due Process Clause as a substitute for the Fourth Amendment in order to exclude evidence obtained through means described as "conduct that shocks the conscience."[9] *Id.* at 172; *see also Irvine v. People*, 347 U.S. 128, 133, (1953) (plurality opinion) ("Although *Rochin* raised the search-and-seizure question, this Court studiously avoided it").

> With a "shock the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics.

Boddie v. Connecticut, 401 U.S. 371, 393 (1971). To resolve the tension between cases finding the conscience shocking standard lacking in predictive value and constitutional certainty, and those cases that find the more traditional tort standards to adequately set forth workable standards, Amicus turns to Eighth Amendment jurisprudence.

---

[9] In 1914, the Supreme Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. *Weeks v. United States*, 232 U.S. 383 (1914). In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Supreme court declined to extend this rule to state proceedings on state crimes. Although the Court had "no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy [as in this case] it would run counter to the guaranty of the Fourteenth Amendment." *Id.* at 28. However, it held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of the evidence obtained by an unreasonable search and seizure." *Id.* at 33.

B. Eighth Amendment Jurisprudence.

This Court distinguishes prison cases challenging the "conditions of confinement" from those that challenge "excessive use of physical force." 511 U.S. at 835-36. Excessive physical force cases require prison officials act with "a knowing willingness that [harm] occur." *Id.* at 836. On the other hand, this Court held a prison official may be liable under the Eighth Amendment in a "conditions of confinement" case for acting with "deliberate indifference" to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.

1. Applying Excessive Force Standards to Police Chases: Intent to Harm

Section 1983 claims for use of excessive force in prison settings call for a very high standard of fault before prison officials may be held liable. *Farmer v. Brennan*, 511 U.S. at 835 citing *Hudson v. McMillian*, 503 U.S. at 6-7 (internal quotation marks omitted). The rationale is generally that prisoners are dangerous, they have been convicted according to due process and, officials must make severely time-constrained decisions regarding the use of force and often under tremendous pressure and without the benefit of hindsight. Such cases are uniquely relevant to the case at bar. Decisions to use physical force are typically made, "[I]n haste, under pressure, and frequently without the luxury of a second chance . . . " *Id.* The factual setting described above is not distinct from the police chase scenario in any constitutionally significant way and demonstrates that the Ninth Circuit "deliberately indifferent or in reckless disregard" standard

incompletely balances the competing interest raised by police efforts to apprehend fleeing suspects.

> In this setting [prison], a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.

475 U.S. at 320; *Farmer v. Brennan*, 511 U.S. at 835-36.

Amicus recognize this court's prior rejection of the subjective or state of mind component in qualified immunity cases, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and in Fourth Amendment cases calling for application of the substantive constitutional standard. *See Graham v. Connor.* However, this Court has explicitly left open whether the substantive component of the due process clause requires a state of mind requirement akin to intent to harm, *Daniels v. Williams*, 474 U.S. 327, 334 n3 (1986), and if the facts of *Rochin v. California*, 342 U.S. 165 (1952) teach anything, a very high standard of culpability is required. An intent to harm standard is particularly appropriate where the force is generally authorized or is facially legal, such as quelling prison riots or chasing fleeing criminal suspects. *See generally, Tennessee v. Garner; Whitley v. Albers.*

> Police chases are not only a necessary concomitant of maintaining order in our modern society, but they re also inherently hazardous. By their very nature, they inevitably create some risk of injury to bystanders. Officers must decide the balance between law enforcement and risk to public safety quickly and while under considerable pressure. In such circumstances, permitting the Due Process Clause to serve as a surrogate for state tort law would hamstring the police in their performance of vital duties.

Evans v. Avery, 100 F.3d 1033, 1038 (1st Cir. 1996); *California v. Hodari D.*, 499 U.S. at 626 ("Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged.") This Court has never found the substantive component of the due process clause to shield citizens from risks that "attend living together in Society." *See Daniels v. Williams*, 474 U.S. at 332. Because police chases of suspects are simply an irreducible element of an ordered society, if this Court determines a police chase resulting in a car accident implicates the Fourteenth Amendment, the state of mind requirement in our Eighth Amendment excessive force cases sets forth an appropriately strict standard of fault for the individual officer. *See Hodari D.*, 499 U.S. at 626.

2. *Applying the Conditions of Confinement Standards to Police Chases: Subjective Recklessness*

If the Eighth Amendment "intent to harm" standard is deemed unworkable, Amicus contend that the conditions of confinement cases provide the next best articulation of a workable standard under the Fourteenth Amendment. *Farmer v. Brennan*, 511 U.S. 825 (1994).

In *Farmer v. Brennan*, a preoperative transsexual exhibiting feminine characteristics was beaten and raped after being transferred into the prison's general population. Prisoner sought damages alleging prison officials had acted with "deliberate indifference" to his Eighth Amendment rights because they knew the penitentiary had a violent environment and a history of inmate

assaults and that petitioner would be particularly vulnerable to sexual attack. This Court promptly concluded deliberate indifference, in a "conditions of confinement" setting is the equivalent of "acting recklessly". *Id.* at 836.

> The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware. (all citations omitted)

511 U.S. at 836-37.

> [S]ubjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for "deliberate indifference" under the Eighth Amendment.

511 U.S. at 840; *see also*, 511 U.S. at 838 (" . . . the common law reflects such concerns when it imposes tort liability on a purely objective basis."); Prosser and Keeton §§ 2, 34, pp. 6, 213-214; Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680.

Finally, this Court's expression of how the subjective recklessness standard might work in practice demonstrates the propriety of applying the test in the police chase scenario.

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, (citation omitted), and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. Cf. LaFave & Scott § 3.7, p. 335.

511 U.S. at 842. If "police officer" is substituted for "prison official" in the above quotation its applicability to the instant case is manifest. Similarly,

> Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause. (citations and internal quotations omitted)

The above formulation places the test in the context of the specific claim advanced in the instant case. Lewis claims he has a right to have Deputy Smith undertake and execute a police chase in a manner that protects Lewis' right to personal security. *See* fn1 herein. Ultimately, society's need for police chases of suspects to maintain ordered liberty is a reasonable one that justifies the high standard of culpability or degree of fault appearing in the aforecited cases.

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

Kansas v. Hendricks, No. 95-1649 (1997). Police enforcement of existing laws, and the execution of apprehension methods appropriate to the setting require that this Court seriously consider that all citizens benefit from fast and effective police response and absent an intentional use of the vehicle as a weapon to cause harm, or a subjectively reckless use of a vehicle in light of known facts, injuries

to bystanders are the unfortunate consequence of shared societal risks and obligations.

> Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.

Daniels v. Williams, 474 U.S. at 332.

IV. The Ninth Circuit Decision Erroneously Assumed a Constitutional Violation had Occurred and Applied the Wrong Standard of Conduct to that Assumed Violation.

On direct appeal the Ninth Circuit rather summarily determined Lewis' claim arose under the Fourth Amendment and that no Fourth Amendment duties or violations existed. JA/50. The Court promptly turned to its prior cases addressing the standard of conduct (or degree of fault) applied to officers in other cases raising substantive due process claims to determine whether, "deliberate indifference to, or reckless disregard of a person's right to life and personal security," sustains a Section 1983 claim. JA/53. Relying on *City of Canton v. Harris*, 489 U.S. 378 (1989) the court repudiated its earlier cases and concluded a genuine issue of material fact existed as to whether Officer Smith was recklessly indifferent to Lewis' constitutional right to life and personal security. JA/54. The Court did not discuss the difference between subjective and objective recklessness. *Compare Farmer v. Brennan*, 511 U.S. at 837-845 (discussing objective and subjective standards).

The Ninth Circuit appears to have made two errors. First, it assumed, citing *Daniels v. Williams*, 474 U.S. at

331, that duties running to suspects and perhaps bystanders exist under the Fourteenth Amendment when police chase fleeing suspects such as decedent Lewis. Such an assumption runs afoul of this Court's substantive due process cases requiring a, "careful description" of the asserted fundamental liberty interest. *See Washington v. Glucksberg*, No. 96-110 (1997) (citations omitted); *Collins v. Harker Heights.*[10] The Ninth Circuit framed Lewis' Fourteenth Amendment "right" as one of "personal security". JA/51. The Ninth Circuit's characterization of Lewis' right does not include the specificity required by this Court's prior cases and when Lewis' claim is correctly stated and reviewed as a duty owed by police, it does not state a violation of the Constitution.

Second, the Ninth Circuit erroneously construed *Canton v. Harris* to be a constitutional standard of conduct or degree of fault case, *see* JA/52, despite this Court's express admonition that it was not deciding a "degree of fault" case at all. *See* 489 U.S. at 388. A close reading of *Canton v. Harris* discloses that the Court's "deliberate indifference" rule was adopted to reach a very narrow class of cases wherein an obvious need to train city personnel to avoid the plain or inevitable violation of constitutional rights exists, and the city are deliberately indifferent to that need, the deliberate decision resulting in the lack of necessary training may be appropriately considered a city "policy" subjecting the city itself to liability under *Monell v. New York City Dept. of Social*

---

[10] *See also Maryland v. Wilson*, No. 95-1268 (1997) (holding Fourth Amendment does not require particularized suspicion to seize passenger in vehicle for which a justifiable stop was initiated).

Services, 436 U.S. 658 (1978). *See also Id.* at 395 (O'Connor, J., concurring in part dissenting in part) (the "policy of inaction" is the functional equivalent of a decision by the city itself to violate the Constitution.) *Canton v. Harris* cannot be read as impacting this Court's cases addressing constitutional standards of conduct or degree of fault for individuals in any significant way.

In the more recent case of *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) this Court assumed for the purpose of decision that use of the term "deliberate indifference" to characterize the city's failure to train its sanitation department employees is sufficient to hold the city responsible if, and only if, the complaint has also alleged a constitutional violation. *Collins v. Harker Heights*, 503 U.S. at 124. This Court expressly rejected "deliberate indifference" as a degree of fault statement, 503 U.S. at 124, and found the *Canton* formulation limited to, "the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents." *Collins v. Harker Heights*, 503 U.S. 115, 124 (1992); 503 U.S. at 122 (noting " . . . the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred.") With the exception of our Eighth Amendment jurisprudence, *see Estelle v. Gamble*, 429 U.S. 97, 104 (1976), no case was cited by the Court wherein "deliberate indifference" had established a threshold for deprivation or violation of a constitutional right. The Ninth Circuit's reliance on *City of Canton v. Harris* is in derogation of the clarification of that holding appearing in *Collins v. Harker Heights*.

V. Conclusion

This Court's Fourth Amendment jurisprudence resolves this case because Lewis was a suspect accidentally injured during efforts to seize him. Alternatively, if a duty exists to undertake police chases consistent with some standard arising from the Fourteenth Amendment, an individual officer's conduct should be assessed to determine, (1) if the conduct was intentionally undertaken for the express purpose of causing harm to the person ultimately injured or, (2) if the conduct was undertaken with subjectively reckless disregard for the injured person's right to personal security. A lesser showing states no constitutional claim.

> [I]n the ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on "the Due Process Clause of the Fourteenth Amendment simpliciter.

510 U.S. at 285 (Kennedy J., concurring) citing *Parrat v. Taylor*, 451 U.S. at 536.

Respectfully submitted,

GARY LIGHTMAN
Counsel of Record
2705 North Front Street
Harrisburg, PA 17110
717-234-0111

THOMAS T. RUTHERFORD
Chief Legal Counsel for Amicus FOP
320 Gold Street S.W.
Suite 1000
Albuquerque, New Mexico 87103
505-842-6700

WILLIAM J. FRIEDMAN IV
Litigation Counsel for Amicus FOP
P.O. Box 2147
Santa Fe, New Mexico 87504
505-989-9800

(18)

Supreme Court, U.S.
FILED
OCT 1 1997
CLERK

No. 96-1337

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SACRAMENTO COUNTY, SACRAMENTO SHERIFF'S DEPARTMENT, JAMES E. SMITH,
Petitioners,

v.

TERI LEWIS AND THOMAS LEWIS, PERSONAL REPRESENTATIVES OF THE ESTATE OF PHILIP LEWIS,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF OF STOPP (SOLUTIONS TO THE TRAGEDIES OF POLICE PURSUITS) IN SUPPORT OF RESPONDENTS

ANDREW C. CLARKE
STOPP
SOLUTIONS TO THE TRAGEDIES OF POLICE PURSUITS
6256 POPLAR AVENUE
MEMPHIS, TENNESSEE 38119
(901) 680-9777

IKON Document Services Memphis, Tennessee

4208

BEST AVAILABLE COPY

No. 96-1337

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SACRAMENTO COUNTY, SACRAMENTO SHERIFF'S
DEPARTMENT,
JAMES E. SMITH,
Petitioners,

v.

TERI LEWIS AND THOMAS LEWIS, PERSONAL REPRESENTATIVES
OF THE ESTATE OF PHILIP LEWIS,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF OF STOPP
(SOLUTIONS TO THE TRAGEDIES OF POLICE PURSUITS)
IN SUPPORT OF RESPONDENTS

ANDREW C. CLARKE
STOPP
SOLUTIONS TO THE TRAGEDIES OF
POLICE PURSUITS
6256 POPLAR AVENUE
MEMPHIS, TENNESSEE 38119
(901) 680-9777

QUESTION PRESENTED

I. Whether a police officer who displays deliberate indifference or reckless disregard to the risks of a high-speed pursuit to the public is liable for injuries proximately caused to the suspect and/or innocent third party for violating the victim's substantive due process rights.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

INTEREST OF THE AMICUS CURIAE.....1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

CONCLUSION.....26

CERTIFICATE OF SERVICE 27

APPENDIX A.....A-1

APPENDIX B.....B-1

APPENDIX C.....C-1

TABLE OF AUTHORITIES

CASE PAGE

Daniels v. Williams,.....8
474 U.S. 327 (1986)

Fagan v. Vineland,.....24
22 F.3d 1293 (3rd Cir. 1996)

Farmer v. Brennan,.....7
114 S.Ct 1970 (1994)

Lewis v. Sacramento,.....24
98 F.3d 434 (9th Cir. 1996)

Tennessee v. Garner,.....7,11,24
471 U.S. 1 (1986)

OTHER AUTHORITIES

Alpert, Geoffrey, Police Pursuit: Policies and Training, National Institute of Justice: Research In Brief (May1997).....14,22

TABLE OF AUTHORITIES CONT'D

OTHER AUTORTIES PAGE

Alpert, Geoffrey P., Pursuit Driving: Planning Policies and Action from Agency, Officer, and Public Information, 7 Police F. 3 (Jan.1997).....12

Alpert, Geoffrey & Patrick Anderson, The Most Deadly Force: Police Pursuits, 3 Justice Quarterly 1-14 (1986).....6

Alpert, Geoffrey, Andrew Clarke and William Smith, The Constitutional Implications Of High-Speed Police Pursuits Under a Substantive Due Process Analysis : Homeward Through the Haze, 27 U. Mem. L. Rev. 599 (Spring1997)¼...¼.. 8

Alpert, Geoffrey, Michael Cosgrove, Roger Dunham, Dennis Kenney & William Smith, Police Pursuit & The Use of Force: A Final Report to National Institute Of Justice (April 1996).....18

TABLE OF AUTHORITIES CONT,D

OTHER AUTHORITIES PAGE

Alpert, Geoffrey & Roger G. Dunham, Police Pursuit Driving: ControllingResponses to Emergency Situations, Greenwood Press (1990).....13

Alpert, Geoffrey & Roger G. Dunham, Police Use of Deadly Force: The Miami Experience, In Critical Issues In Policing: Contemporary Readings, Waveland Press (1990)..... 13

Alpert, Geoffrey and Lorie Fridell, Police Vehicles and Firearms: instruments of Deadly Force, Waveland Press(1992)..... .....passim

1-2 James Auten, An Analysis of Police Pursuit Driving Operations, Champaign, Illinois Police Training Institute, (1994).....18-21

TABLE OF AUTHORITIES CONT'D

OTHER AUTHORITIES — PAGE

Charles, Michael, David Falcone and Edward Wells, Police Pursuit in Pursuits of Policy: The Pursuit Issue Legal and Literature Review, and an Empirical Study -Summary Report, AAA Foundation for Traffic Safety, (April 1992).... 3

Geller, William A. & Hans Toch, And Justice for All, Police Executive Research Forum: Washington, D.C.(1992) 3

Sense, Jeffrey and Thomas Lucadamo, To Pursue or not to Pursue? That is the Question: Modeling Police Vehicular Pursuits, XV Am. J. Police, Volume 55 (1996).....16

INTEREST OF AMICUS CURIAE

STOPP is an acronym for Solutions to the Tragedies of Police Pursuits.[1] STOPP is a nationwide, non-profit organization based in Jackson Hole, Wyoming dedicated to reducing the number of tragedies which occur each year as a result of police pursuits. STOPP's four main goals are:

1) to provide victim support services by counseling victims of high speed pursuits and their families;
2) to increase public awareness concerning the tragedies resulting from police pursuits and to inform the public of the risks of pursuits;
3) to work with law enforcement agencies to adopt clear and unambiguous policies consistent with law enforcement's primary mission of protecting the public and the development of new technologies which will reduce the need and length of high speed pursuits; and
4) to advocate the enactment of stiffer penalties for those who choose to flee from police.

---

[1] Pursuant to Supreme Court Rule 37.6, Amicus would state that neither counsel for the Plaintiff nor Defendant authored this brief in whole or in part and that no person or entity other than Amicus has made a monetary contribution regarding the submission of this Brief. Letters of consent to the filing of this Amicus Brief have been lodged with the Clerk of the Court pursuant to Rule 37.2.

STOPP was founded by Lynne Dunn, an attorney in Sea Isle City, New Jersey, Gerald LaCrosse, a city councilman in Beachwood New Jersey, and Robert Ewing, a retired businessman from Jackson Hole, Wyoming. STOPP is comprised of victims of pursuits, their families, law enforcement officers, lawyers, senators congressmen, city councilmen, criminologists and researchers on police pursuits who all share the common goal of reducing the number of tragedies resulting from police pursuits.

STOPP submits that the issues involved in this appeal concern important questions of constitutional law which will impact the rights of persons injured during the course of police pursuits and submits this brief as Amicus Curiae to present its experience and views regarding police pursuits for this Honorable Court's consideration.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented by the Respondent.

SUMMARY OF ARGUMENT

The police vehicle is the last unregulated weapon in a police officer's arsenal. Each year thousands of people are injured and killed during the course of high speed pursuits. While many injuries occur to the driver of the fleeing vehicle, many totally innocent third parties are injured and killed during the course of high speed pursuits. The data collection efforts on both firearm and

pursuit related deaths is in need of improvement before one can state empirically which activity causes more deaths. However, many criminologists believe that more people are killed each year during the course of high-speed pursuits than any other police activity, including firearms.[2] Given that thousands of people are injured and killed during the course of high speed chases each year, Amicus submits that police pursuits should be restricted by the substantive due process component of the Fourteenth Amendment and that officers should not be given unbridled discretion with respect to the instigation, continuation and termination of pursuits.

At the present time, there is a conflict among the Circuits regarding the proper standard to be employed in substantive due process police chase cases: 1) "shocks the conscience" and 2) "deliberate indifference" or "reckless disregard." Amicus submits that the "shocks the conscience" standard is undefinable and will not serve to provide either law enforcement or the public with a meaningful standard from which they can take steps to reduce the number of tragedies from police pursuits.

Amicus submits that the "deliberate indifference" or "reckless disregard" standard governing other law

---

[2] See William A. Geller & Hans Toch, And Justice for All, Police Executive Research Forum: Washington, D.C. (1992); Geoffrey P. Alpert & Lorie A. Fridell, Police Vehicles and Firearms: Instruments of Deadly Force, Waveland Press (1992); and Michael Charles et al., Police Pursuit in Pursuit of Policy: The Pursuit Issue, Legal and Literature Review, and an Empirical Study - Summary Report, AAA Foundation for Automotive Safety, (April 1992).

enforcement actions will provide both law enforcement and the public with a familiar standard from which to formulate training and policies to reduce the number of injuries or deaths stemming from pursuits. Imposing liability for violating a victim's substantive due process rights under a "deliberate indifference" or "reckless disregard" standard will not result in a constitutionalization of tort law. This standard would only seek to hold an officer liable for injuries to a victim resulting from a pursuit when an officer consciously disregards a known danger to a victim or class of victims during the course of a pursuit.

ARGUMENT

I. WHETHER A POLICE OFFICER WHO DISPLAYS DELIBERATE INDIFFERENCE TO OR RECKLESS DISREGARD OF THE RISKS OF A HIGH-SPEED PURSUIT TO THE PUBLIC IS LIABLE FOR INJURIES PROXIMATELY CAUSED TO THE SUSPECT AND/OR INNOCENT THIRD PARTY FOR VIOLATING THE VICTIM'S SUBSTANTIVE DUE PROCESS RIGHTS.

On May 3, 1988, John Basaman was driving home from a day trip to Philadelphia along with his wife and children. As he entered a controlled intersection in Evesham Township, N.J., his car was struck by a man being chased by the police [for a minor traffic offense]. His wife and infant son were killed and his two year old son was critically

injured. The Basaman family lived not more than a mile from us.

Just three days later, on May 8, 1988, Erin Walsh, a neighbor and schoolmate of my daughter's, was coming home from her job at a handicapped facility. A man being chased by the police [again, for a minor traffic offense] crossed into her lane and collided head-on with her car. Tragically, not only was Erin killed, but her mother, who was travelling in the car directly behind her daughter's, witnessed the entire scene. Understandably, the community was outraged that three totally innocent people had been killed, three others had suffered injuries and that two families had been devastated within a few days...

Early on November 16, 1988, a young lady was coming home from visiting with friends when she was struck by a man being chased by police [for a broken head light]. After nine hours in a trauma center, her magnificent heart could no longer wage the battle for life and she left this world with her family behind. The young lady's name was Desere, she was nineteen years old and she was my daughter.[3]

---

[3] Gerald LaCrosse founded The Desere Foundation after his daughter, Desere, was killed as a result of a police pursuit of a traffic offender. The above quoted passage details the events which occurred in Evesham Township, N.J in 1988 which precipitated the formation of The Desere Foundation and was published in Alpert & Fridell, supra note 2, at 148-49.

The above quoted passage details the devastating effect that police pursuits can have on families and communities. Each year thousands of people are injured and killed during the course of police pursuits. Many noted criminologists and police officers have opined that the most deadly weapon in the police officer's arsenal is a police vehicle.[4] A police vehicle or vehicle fleeing from the police travelling at sixty miles per hour has a greater potential for harm than a bullet from a gun.[5] Despite the vast number of persons injured and killed each year from police pursuits, the police vehicle remains the last unregulated weapon in a police officer's arsenal.

Unfortunately for the numerous victims of police pursuits, many courts have failed to interpret the Constitution as providing any meaningful restrictions on the activities of police officers during high speed pursuits. Amicus submits that the reasons for providing victims of reckless police pursuits with constitutional remedies are compelling because many victims are totally innocent third parties who are injured while police engage in high-speed pursuits of traffic offenders. Based on a historical and statistical analysis, there are substantial reasons for providing the victims of police pursuits with

---

[4] Geoffrey P. Alpert & Patrick Anderson, The Most Deadly Force: Police Pursuits, 3 Justice Quarterly 1 (1986).

[5] See illustration attached as Appendix A taken from the State of California, Commission on Peace Officer Standards and Training, Basic Course Instructor Unit Guide 19, Vehicle Operations (July 1996).

constitutional protections.

Every citizen's right to life is protected from governmental intrusion by the Constitution of the United States. With respect to law enforcement activities, the U.S. Constitution guarantees minimal levels of conduct during the course of such activities. In the Fourth Amendment setting, this Honorable Court held in Tennessee v. Garner, 471 U.S. 1 (1986), "It is not better that all **felony** suspects die than that they escape." Id. at 11 (emphasis added). Accordingly, this Honorable Court held that the Constitution protected a suspected fleeing felon's right to life and freedom from deadly and unreasonable force.

In the Eighth Amendment setting, this Honorable Court held in Farmer v. Brennan, 114 S.Ct 1970 (1994), "A prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment. [cites omitted]. This case requires us to define the term `deliberate indifference,' as we do by requiring a showing that the official was subjectively aware of the risk." Id. at 1974. Therefore, even convicted prisoners have a right to be protected from risks known to jailers. Accordingly, while almost all police activities are subject to constitutional scrutiny, the police vehicle remains the last unregulated weapon in a police officer's arsenal. It would be a travesty of justice if this same Constitution failed to recognize that a totally innocent third party killed during a reckless police pursuit did not have the same constitutional right to life as a suspected fleeing felon or a convicted prisoner. While case law has determined that the protections provided by the Fourth

and Eighth Amendment of the Constitution do not apply in the police pursuit setting, protections should be afforded by the substantive due process component of the Fourteenth Amendment.

The touchstone of the substantive due process clause is the protection of an individual's right to life and freedom from arbitrary governmental activity. See Daniels v. Williams, 474 U.S. 327 (1986). While merely negligent conduct is insufficient to trigger substantive due process protections, this Honorable Court in Daniels expressly reserved the question "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." Id. at 334 n. 3. Amicus submits that when officers display reckless disregard or deliberate indifference to the risks of high-speed pursuits and they cause injury, they are engaging in arbitrary governmental conduct. Given the sheer number of persons who are injured and killed during these pursuits, Amicus submits that the Fourteenth Amendment must provide constitutional restrictions on the activities of police officers during the course of police pursuits in order to reduce the number of tragedies resulting from police pursuits.

To illustrate the widespread problems associated with police pursuits and why injuries resulting from police pursuits are deserving of constitutional protection, Amicus submits that a review of the available data on pursuits would afford this Honorable Court with

extremely pertinent information in resolving this issue.[6] Unfortunately, there is no national requirement for police departments to keep pursuit statistics. Accordingly, it is hard to accurately determine the exact number of pursuit related injuries and deaths which occur each year. However, there are several important resources and studies which may shed some light on the risks associated with police pursuits.

One source of information on pursuit related tragedies comes from the National Highway Traffic Safety Administration (hereinafter referred to as NHTSA). Since 1980, NHTSA, through the Fatal Accident Reporting System (hereinafter referred to as FARS), has attempted to maintain data concerning fatalities stemming from police pursuits nationally. However, it should be noted that these statistics do not purport to include all pursuit related deaths.[7] Despite the shortcomings of the FARS reporting procedures, the following pursuit related deaths were reported to NHTSA from 1980-1996:[8]

---

[6] See generally Geoffrey P. Alpert, et al., The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze, 27 U. Mem. L. Rev. 599 (Spring 1997).

[7] The 1993 FARS Newsletter stated, "These changes will maximize our ability to recognize fatalities on the file related to police pursuit; still we won't be able to record all pursuits resulting in fatalities." See also Charles, supra note 2, at 3.

[8] The NHTSA Reports for 1980-1996 are attached as Appendix B. It should be noted that the figures for 1995 and 1996 are neither complete nor final.

1996 - 377
1995 - 383
1994 - 392
1993 - 347
1992 - 298
1991 - 307
1990 - 317
1989 - 300
1988 - 296
1987 - 256
1986 - 309
1985 - 279
1984 - 246
1983 - 295
1982 - 307
1981 - 266
1980 - 331
Total - 5,306

Since 1980 NHTSA has documented 5,306 deaths occurring during the course of pursuits nationally. This figure, although admittedly under-reported by NHTSA, equates to approximately one pursuit related death every day. It is significant to note that according to the NHTSA statistics, California, the jurisdiction where the case sub judice arose, leads the nation in pursuit related deaths with 863 reported pursuit-related deaths during that 16 year period. Texas has the second largest number of pursuit-related deaths during that time period with 459 deaths.

In comparison, the Federal Bureau of Investigation keeps statistics on police use of firearms in the Uniform Crime Reports, Crime in the United States (hereinafter referred to as UCR). The UCR indicates that police officers reported the following firearm-related justifiable homicides from 1991 - 1995:[9]

1991 - 361
1992 - 411
1993 - 451
1994 - 460
1995 - 380
TOTAL 2,063

From 1991 - 1995, there were 1727 pursuit-related deaths and 2063 firearm-related deaths. It is significant to note that in 1995, the number of pursuit-related deaths exceeds the number of justifiable homicides committed by law enforcement even though the figures regarding pursuits are neither complete nor final. Amicus submits that the sheer number of deaths resulting from pursuits is alarming and warrants constitutional protection to victims of pursuit related activities. Given the fact that the use of firearms by police has been constitutionally restricted since the landmark decision of Tennessee v Garner, 471 U.S. 1 (1985), Amicus submits that the Constitution

---

[9] Uniform Crime Reports, Crime in the United States, Fed. Bureau of Investigation, U.S. Dep't of Justice, 1995 (Released Oct. 13, 1996). The pertinent portions of this study are attached as Appendix C.

should similarly place constitutional restrictions on police pursuits.

While the NHTSA statistics only attempt to reflect the fatalities resulting from police pursuits annually, they fail to detail many other important aspects of pursuit activities such as the reason for the pursuit, the duration of the pursuit, whether crashes result from pursuits, whether injuries result from pursuits, etc. It should be noted that the data collection procedures from study to study may be dissimilar. While differences exist in the pursuit figures provided by police agencies, it is remarkable that the rates of crashes, injuries, and deaths are so similar over time and location.[10] Regardless of these imperfections, however, the data presented are representative of our current knowledge of pursuit driving.

California Highway Patrol, Pursuit Study

One of the earliest studies on pursuit driving was conducted in 1983 by the California Highway Patrol (CHP).[11] The CHP study reports findings from an analysis of almost 700 pursuits. The data are organized into two categories: 1) the result of the pursuit; and 2) the reason or motivation for initiating the pursuit. The results indicate the following:

---

[10] Geoffrey P. Alpert, Pursuit Driving: Planning Policies and Action from Agency, Officer, and Public Information, 7 Police F. 3 (Jan. 1997).

[11] See California Highway Patrol, Pursuit Study (1983), reprinted in Alpert & Fridell, supra note 2, at 101-03.

1. 683 pursuits were conducted;
2. 198 pursuits (29%) resulted in accidents;
3. 99 pursuits (15%) resulted in injuries;
4. 7 pursuits (1%) resulted in deaths;
5. 27 pursuits (4%) were voluntarily terminated by the officer;
6. 429 pursuits (63%) were initiated for traffic offenses;
7. 179 pursuits (26%) were initiated for DUI;
8. 75 pursuits (11%) were initiated for serious criminal activity; and
9. 243 pursuits (36%) were voluntarily terminated by the driver who surrendered.[12]

Miami and Metro-Dade Studies

In the recent past, there has been considerable research conducted on pursuits in Dade County, Florida.[13] The major findings, most of which are consistent with data

---

[12] Id. at 101-02.

[13] See Geoffrey P. Alpert & Roger G. Dunham, Police Use of Deadly Force: The Miami Experience, in Critical Issues In Policing: Contemporary Readings at 480 (1990) cited in Alpert & Fridell, supra note 2, at 105; see generally Geoffrey P. Alpert & Roger G. Dunham, Police Pursuit Driving: Controlling Responses to Emergency Situations (1990).

reported in the other studies, include the following information from pursuits occurring from 1985-1987:

1. 952 pursuits were conducted;
2. 364 pursuits (38%) resulted in crashes;
3. 160 pursuits (17%) resulted in injuries;
4. 7 pursuits (.7%) resulted in deaths;
5. 40 pursuits (4%) were voluntarily terminated by the officer;
6. 512 pursuits (54%) were initiated for traffic offenses;
7. 19 pursuits (2%) were initiated for reckless driving or impaired driving;
8. 312 pursuits (33%) were initiated for serious criminal activity;
9. 646 pursuits (68%) resulted in an arrest; and
10. 341 pursuits (36%) resulted in arrests for non-persuitrelated offenses (mostly drug and weapons charges).[14]

A more recent study of Metro-Dade police pursuits for the years 1990-1994 funded by the National Institute of Justice was released in May 1997.[15] The results are as follows:

1. 1,049 high-speed pursuits were initiated;
2. 448 (45%) were initiated for traffic offenses;

[14] See Alpert & Fridell, supra note 2, at 105-08.

[15] See Geoffrey P. Alpert, Police Pursuit: Policies and Training, National Institute of Justice: Research in Brief (May 1997).

3. 45 (4%) were initiated as a result of a broadcast stating "be on the lookout" for a suspect vehicle;
4. 334 (35%) were initiated for suspected felony offenses;
5. 157 (16%) were initiated because of a suspect vehicle;
6. 55 (0.05%) were initiated for unknown reasons;
7. 428 (41%) of pursuits resulted in collisions;
8. 257 (20%) of pursuits resulted in injuries;
9. 10 (3%) of pursuits lasted less than one minute;
10. 37 (10%) of pursuits lasted 2-4 minutes;
11. 206 (59%) of pursuits lasted 5-10 minutes;
12. 99 (28%) of pursuits lasted 11 or more minutes.[16]

It is important to recognize that in 1992, the Metro-Dade Police Department changed its pursuit policy from a judgmental policy, one in which the officer makes most of the operational decisions during a pursuit, to a restrictive policy which limits pursuits to known violent felons. This change in policy resulted in a drastic reduction of pursuits from 279 in 1992 to 51 in 1993. Significantly, Deputy Director G. Thomas Arnold of the Metro-Dade Police Department indicated at the 20th Annual Conference of the Police Executive Research

[16] Id. at 3.

Forum (PERF) in June of 1997, that the crime problem in Miami was unaffected by the change to a restrictive policy.

Baltimore County Study

The Baltimore County Police Department also conducted an analysis of its pursuit data. In 1994, an officer, Tom Lucadamo, conducted an extensive study of pursuits instituted by officers of his police department over a six year period:

1. 1,064 pursuits were reported;
2. 388 pursuits (36%) resulted in a crash (1 crash every 2.7 pursuits);
3. 586 pursuits (55%) were initiated for traffic offenses;
4. 60 pursuits (6%) were initiated for reckless driving or impaired driving; and
5. 266 pursuits (25%) were initiated for suspected felonious activity.[17]

Minnesota Board of Police Officer Standards Study

In 1988, the Minnesota Board of Peace Officer Standards and Training (POST) promulgated pursuit

---

[17] Jeffrey Sense and Thomas Lucadamo, To Pursue or not to Pursue? That is the Question: Modeling Police Vehicular Pursuits, XV Am. J. Police 55 (1996).

policy guidelines for statewide adoption.[18] POST required all law enforcement agencies to collect and submit for analysis a minimum of eleven data elements concerning pursuits and the outcomes of those pursuits. All police departments in Minnesota were reporting their pursuits by October 1989. The Minnesota Highway Patrol maintains separate records and was involved in 123 pursuits in 1994 with 86 (70%) resulting in collisions and 30 (24%) resulting in injuries. The data provided by Minnesota POST (1995) reflect information reported during the 1994 calendar year for all other agencies:

1. 764 pursuits were conducted;
2. 307 pursuits (40%) resulted in crashes;
3. 205 pursuits (27%) resulted in injuries;
4. 1 pursuit (.1%) resulted in death;
5. 30 pursuits (4%) were voluntarily terminated by the officer;
6. 420 pursuits (55%) were terminated when the violators stopped;
7. 519 pursuits (68%) were initiated for traffic offenses;
8. 40 pursuits (5%) were initiated for DUI;
9. 126 pursuits (16%) were initiated for felony vehicle;
10. 16 pursuits (2%) were initiated for warrant

---

[18] See Minnesota Board of Police Standards and Training: A Study of Deadly Force by Police Officers (1991), cited in Alpert & Fridell, supra note 2, at 108-09.

service.[19]

The data reveal the types of pursuits that were conducted in Minnesota and how they were terminated. From 1989 to 1995, the following numbers were reported:

1. 5,903 pursuits;
2. 4,102 (70%) were initiated for traffic offenses;
3. 2,443 (41%) resulted in crashes; and1,553 (26%) ended in injuries.[20]

Illinois Study

James Auten conducted a study of 700 pursuits from 129 agencies that took place in Illinois during 1991 and 1992.[21] There is, however, no data from the state's two largest agencies, the Chicago Police Department or the Illinois State Police. The statistics demonstrate the following:

1. 273 pursuits (39%) resulted in crashes (1 in

---

19 Geoffrey P. Alpert et al., Police Pursuit & The Use of Force: A Final Report to National Institute of Justice (April 1996) at Ch. 3, p. 4.

20 Id. at 5.

21 See 1 & 2 James Auten, An Analysis of Police Pursuit Driving Operations, Champaign, Illinois Police Training Institute (1994).

2.6);
2. 77 pursuits (11%) resulted in injuries (1 in 9.2);
3. 12 pursuits (1.7%) resulted in death (1 in 58);
4. 385 pursuits (55%) were initiated for minor traffic offenses;
5. 77 pursuits (11%) were initiated for suspected stolen vehicles;
6. 70 pursuits (10%) were initiated for suspected DUI/DWI;
7. 84 pursuits (12%) were initiated for felony offenses;
8. 68 pursuits (9.7%) were terminated by the pursuing officer or supervisor;
9. 518 pursuits (74%) resulted in arrests; and
10. 145 pursuits (21%) resulted in felony arrests.[22]

Aggravated fleeing and eluding, criminal damage to property, and motor vehicle theft comprised 75% of the charges.[23] The study concluded that pursuits for any reason are dangerous and must be managed. With respect to pursuits for traffic offenses, Auten opined:

> For at least 46 people that ultimate penalty for running a stop sign, speeding, failure to yield, improper passing, etc., was an injury or death.

---

22 Id.

23 2 Auten, supra note 20, at 867.

> That's ridiculous! If public safety is in fact the ultimate goal, then it seems rather obvious that pursuits initiated for this reason should be eliminated.[24]

Using National Safety Council estimates for injury and fatal accidents, Auten estimated the total economic loss from the pursuits to be $5,994,010, an average of $22,118 per pursuit-related collision.[25] Further, Auten calculated that 31% of all accidents involved innocent bystanders **and that the most common terminating event (39%) was a wreck.**[26] One of the most important figures Auten reports is that only thirteen pursuits of suspected felons resulted in arrests. These and the other 687 pursuits resulted in twelve deaths, 273 crashes, and almost $6,000,000 in economic loss. From his data, Auten concludes:

> It must be acknowledged that police officers cannot be given the unrestricted authority to engage in pursuits. There is ample evidence to indicate that officers' decisions to initiate or continue a pursuit are often characterized by faulty decision making. .

---

24 Id. at 806.

25 See 1 Auten, supra note 20, at 16. There are no estimates for legal costs, agency costs for investigation of the accident, or possible policy violations included in this figure.

26 See 2 Auten, supra note 20, at 867.

> . . These are the situations that must be restricted if the protection of the public is the foundation of police operations.[27]

AAA FOUNDATION FOR TRAFFIC SAFETY STUDY

In April of 1992, David Falcone, Michael Charles and Edward Wells conducted a study of pursuits conducted in Illinois funded by the AAA Foundation for Traffic Safety. The study surveyed all available past studies on pursuits. This study revealed:

1. 1% to 3% of pursuits end in death;
2. 5% to 24% of pursuits end in injuries;
3. 18% to 44% of pursuits end in crashes;
4. 9% to 30% of pursuits were initiated for violent felonies; and
5. 52% to 63% of pursuits were initiated for traffic offenses.[28]

Omaha, Nebraska Study

The City of Omaha modified its policy in 1994 to permit pursuits for law violations that previously would have been against policy. As a result, the number of

---

27 Id. At 806.

28 Charles, supra note 2, at 6.

pursuits increased from just 17 in 1993 to 122 in 1994.[29] The study of pursuits from 1992 - 1994 revealed:

1. 229 pursuits were reported;
2. 119 pursuits (51.9%) lasted one minute;
3. 89 pursuits (39%) lasted 2-4 minutes;
4. 10 pursuits (5%) lasted 5-10 minutes;
5. 3 pursuits (1%) lasted over 11 minutes.
6. 112 pursuits (51%) were initiated for traffic offenses;
7. 89 pursuits (40%) were initiated for felony offenses;
8. 72 pursuits (32%) resulted in collisions;
9. 91 pursuits (40%) resulted in property damages;
10. 31 pursuits (14%) resulted in injuries.[30]

These statistics clearly indicate that police pursuits are extremely dangerous activities and that each year thousands of victims are injured and killed as a result of police pursuits. As previously stated, the police vehicle remains the last unregulated weapon in a police officer's arsenal. The number of persons injured and killed each year during police pursuits is more alarming when one considers that the majority of pursuits are conducted for minor traffic offenses. Amicus submits that police

29 See Alpert, supra note 15, at 3.

30 Id.

officers should not be able to risk the lives of the public in their zeal to apprehend suspects, especially persons suspected of committing minor offenses. If the primary goal of law enforcement is to protect the public and lives, pursuits must have constitutional limitations and restrictions commensurate with other law enforcement activities.

In Petitioner's Brief and the Amicus Briefs submitted in support of the Petitioner, it is claimed that officers should be allowed unfettered discretion in pursuit activities and should be immune from the probable consequences of pursuits. Petitioner would allow these extremely dangerous pursuits to continue regardless of whether the officers already had information which would make apprehension at a later time possible through proper investigative procedures without exposing the public to the dangers of a high-speed pursuit.

It is significant that almost all Briefs in support of the Petitioner argue that the California Highway Patrol Study performed in 1983 provides support for their position. Interestingly, that study concluded that "a very effective technique in apprehending pursued violators may be simply to follow the violator until he voluntarily stops or crashes."[31]

Amicus submits that involuntarily utilizing citizens of the United States as rolling roadblocks during police pursuits is patently unconstitutional. Further, all Briefs in support of the Petitioner's position fail to point out, as the

31 California Highway Patrol Pursuit Study, (1983) at 17, reprinted in Alpert & Fridell, supra note 2, at 103.

Ninth Circuit did in Lewis at 442, that a police officer's most valuable tool in diminishing the risks that a pursuit poses to the public is to discontinue the chase.

Amicus submits that this Honorable Court should recognize that constitutional rights are violated when police officers act with deliberate indifference or reckless disregard to the risks of pursuits. For reasons more fully explained in the Amicus Brief filed by ATLA, Amicus submits that the "shocks the conscience" standard utilized in Fagan v. Vineland, 22 F.2d 1292 (3rd Cir. 1992) has never been adequately defined and will not provide either law enforcement or the public with a clear standard that will protect the constitutional rights of citizens of the United States and reduce the number of tragedies stemming from police pursuits. On the other hand, the "deliberate indifference" or "reckless disregard" standard will provide reasonable and meaningful restrictions on pursuit-related activities and will serve to restrict police officers from engaging in pursuits when the risk of injury and death to the public from a pursuit are greater than the societal need for immediate apprehension of the suspect.

As this Honorable Court noted in the Fourth Amendment setting in Tennessee v. Garner, 471 U.S. 1 (1986), "It is not better that all felony suspects die than that they escape." Id. at 11. In Garner, this Honorable Court determined that the apprehension of criminals, even if they are suspected felons, has its constitutional limits. Amicus submits that police officers should be similarly restricted in their efforts to apprehend suspected criminals through the use of police pursuits due to the significant number of persons who are injured and killed each year

by police pursuits. This loss of life is particularly alarming given the fact that many of the victims of pursuits are totally innocent third parties and the vast majority of pursuits are initiated for minor traffic offenses.

Consistent with the goal of law enforcement to protect lives and public safety, Amicus respectfully submits that this Honorable Court should affirm the Ninth Circuit Court of Appeals and hold that a police officer violates the substantive due process rights of a victim injured in a pursuit when the officer displays "deliberate indifference" to or "reckless disregard" of the risks of a pursuit.

CONCLUSION

Based on the foregoing argument and reasoning, Amicus respectfully moves this Honorable Court to affirm the Ninth Circuit Court of Appeals and hold that the proper standard to be applied in substantive due process police chase cases is reckless disregard or deliberate indifference.

RESPECTFULLY SUBMITTED,

ANDREW C. CLARKE
Counsel of Record
STOPP
SOLUTIONS TO THE TRAGEDIES
OF POLICE PURSUITS
6256 Poplar Avenue
Memphis, Tennessee 38119
(901) 680-9777
Attorney for *Amicus Curiae* STOPP

CERTIFICATE OF SERVICE

I, Andrew C. Clarke, a member of the bar of this Honorable Court, hereby certify that three copies of the *Amicus Curiae* Brief of STOPP in the above referenced matter have been served on the following persons:

Michael Baum
Paul J. Hedlund
Attorney for Respondents
Kananack, Murgatroyd, Baum & Hedlund
12100 Wilshire Boulevard, Suite 950
Los Angeles, California 90025

Terence John Cassidy
Marcos A. Kropf
Attorney for Petitioners
Porter, Scott, Weinberg & Delehand
350 University Avenue, Suite 200
Sacramento, California 95825

Andrew C Clarke

Andrew C. Clarke

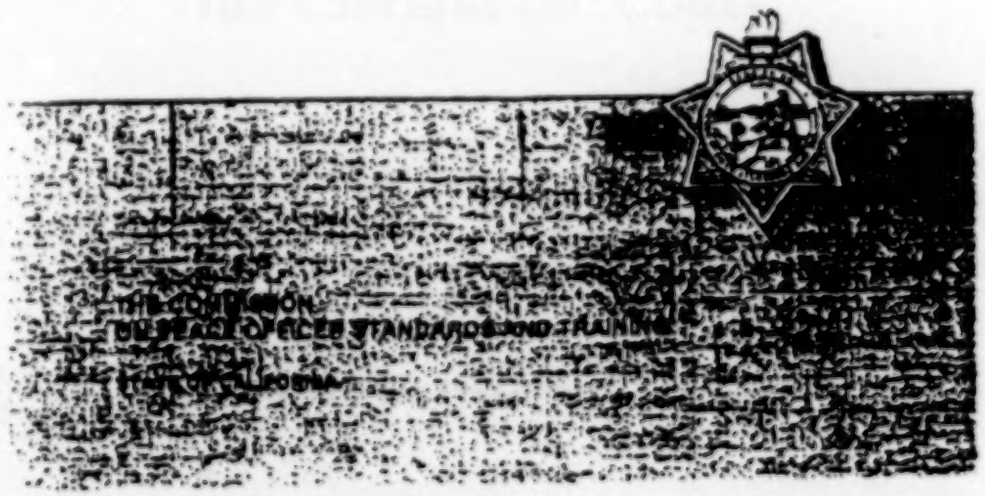
APPENDIX A

BASIC COURSE INSTRUCTOR UNIT GUIDE

19

VEHICLE OPERATIONS

July 1998



BEST AVAILABLE COPY

ILLUSTRATION #1

.44 Magnum Revolver		Car	
Weight of Bullet	240 grains	Weight of Vehicle	4000 pounds
Muzzle Velocity	1600 fps. (1090 mph)	Velocity	88.02 fps. (60 mph)
Foot pounds of energy at muzzle	1400	Foot pounds of energy at impact with stationary object:	Approximately 480,000
People it could kill - maybe 4 with an average of 325 fp per person.		People it could kill about 1477 with an average of 325 fp per person.	

The NHTSA statistics

identified as Appendix B

have been lodged with

the Clerk of the Court

APPENDIX C

U.S. Department of Justice
Federal Bureau of Investigation

Crime in the United States

1995

Uniform Crime Reports

Release Date, Sunday, October 13, 1996

Law Enforcement Response

The 1995 clearance rate for murder, 65 percent for law enforcement agencies nationwide, is higher than for any other Crime Index offense. Eighty percent of murders in rural counties, 66 percent of those in suburban counties, and 63 percent in the Nation's cities were cleared. Among the city population groups, those with populations under 25,000 reported the most successful clearance rate, 81 percent. (See Table 25.)

Regionally, the highest murder clearance rates were registered in the South and the Midwest, each with 70 percent. Following were the Northeastern States with 59 percent and the Western States with 58 percent.

The proportion of juvenile involvement, as measured by clearances, was lower for murder than for any other index crime. Persons under 18 years of age accounted for 9 percent of the willful killings cleared by law enforcement nationally in 1995. Only persons in this young age group also accounted for 9 percent of clearances in the Nation's cities and suburban counties. They accounted for 7 percent of the rural county clearances.

Law enforcement agencies made an estimated 21,230 arrests for murder in 1995. Fifty-six percent of the arrestees in 1995 were under 25 years of age, with the 18- to 24-year age group accounting for 41 percent of the total. (See Table 38.)

Ninety-one percent of those arrested for murder in 1995 were males and 9 percent, females. Blacks comprised 54 percent of the total; whites, 43 percent; and the remainder, other races.

The 1995 murder arrest total was 6 percent lower than the [illegible]. During the 2-year period, arrests of adults decreased 4 percent and those of juveniles dropped 14 percent. Arrests of females for murder were down 11 percent, and those of males, down 6 percent.

Long-term trends indicate the 1995 murder arrest total was 15 percent below the 1991 level but 8 percent higher than the 1986 figure.

Justifiable Homicide

Certain willful killings are classified as justifiable or excusable, based on law enforcement investigation. In Uniform Crime Reporting, justifiable homicide is defined as and limited to the killing of a felon by a law enforcement officer in the line of duty, or the killing by a private citizen of a felon during the commission of a felony. These offenses are tabulated independently and are not included in the murder count.

In 1995, the total number of justifiable homicides decreased 20 percent. The justifiable homicide total was 631 in 1995 and 815 in 1994. Compared to the 1991 count of 698, the 1995 total was down 7 percent. Of justifiable homicides in 1995, 383 involved law enforcement officers and 268 were by private citizens. Data on weapons showed that handguns were the weapons used most often in justifiable homicides. (See Tables 2.16 and 2.17.)

Table 2.16—Justifiable Homicide by Weapon, Law Enforcement,[1] 1991–1995

Year	Total	Total firearms	Handguns	Rifles	Shotguns	Other guns (type not stated)	Knives or other cutting instruments	Other dangerous weapons	Personal weapons
1991	367	361	319	18	23	7	1	3	2
1992	418	411	357	22	31	15	6	1	3
1993	453	451	391	22	28	12	—	2	2
1994	462	448	406	21	20	6	—	1	1
1995	383	380	343	13	19	4	—	3	—

[1] The killing of a felon by a law enforcement officer in the line of duty.

Table 2.17—Justifiable Homicide by Weapon, Private Citizens,[1] 1991–1995

Year	Total	Total firearms	Handguns	Rifles	Shotguns	Other guns (type not stated)	Knives or other cutting instruments	Other dangerous weapons	Personal weapons
1991	331	286	242	13	25	13	29	6	2
1992	394	311	264	10	30	3	31	8	6
1993	357	313	256	15	25	11	28	9	7
1994	353	316	265	17	29	16	19	13	5
1995	268	239	179	18	28	8	24	10	6

[1] The killing of a felon, during the commission of a felony, by a private citizen.